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MUNICIPAL LIABILITY FOR POLICE MISCONDUCT
Michael P. Seng

COMMENTS

DIAMOND IN THE ROUGH: LOCAL LIABILITY FOR UNCONSTITUTIONAL CONDITIONS IN COUNTY JAILS—AN ANALYSIS OF JONES v. DIAMOND

CONVERGENCE OF THE COPYRIGHT LAW AND THE SHERMAN ACT

VOLUME 51 MARCH 1980 NUMBER 1

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MUNICIPAL LIABILITY FOR POLICE MISCONDUCT

*Michael P. Seng**

I. INTRODUCTION

The absolute immunity from liability in civil rights actions under 42 U.S.C. section 1983,[1] formerly enjoyed by municipal corporations, has now been definitively withdrawn by the Supreme Court of the United States.[2] Indeed, in only two years, the Supreme Court has moved from the position that municipalities are absolutely immune, to the position that municipalities are strictly liable under section 1983.[3] In 1978, the Court held in

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[1] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supreme Court in Martinez v. California, 445 U.S. 920 (1980), ruled that state courts may entertain § 1983 actions. This article, however, will concentrate on suits commenced in federal court.

[2] The Supreme Court had expressly held that municipal corporations could not be sued for damages in Monroe v. Pape, 365 U.S. 167, 191 (1961). Although local public entities were commonly named as defendants in suits in equity both prior to and after *Monroe*, the Supreme Court seemed to disapprove of this procedure in City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973). Distinguishing § 1983, some lower courts held that municipal corporations could be named as defendants in actions filed under 42 U.S.C. § 1981 (1976). *See, e.g.,* Mahone v. Waddle, 564 F.2d 1018, 1031 (3d Cir. 1977) (city not immune from liability under § 1981 for police brutality); Sethy v. Alameda County Water Dist., 545 F.2d 1157, 1160 (9th Cir. 1976) (water district not categorically immune from liability under § 1981); Rafferty v. Prince George's County, 423 F. Supp. 1045, 1058 (D. Md. 1976) (county not immune from liability under § 1981); Hines v. D'Artois, 383 F. Supp. 184, 190 (W.D. La. 1974) (police service board not immune from liability for equitable relief under § 1981); Washington v. Chester County Police Dep't, 300 F. Supp. 1279, 1281 (E.D. Pa. 1969) (police department not immune from liability under § 1981).

[3] Owen v. City of Independence, 445 U.S. 622, 665 (1980) (Powell, J., dissenting).

Monell v. Department of Social Services[4] that local governmental entities are "persons" to whom section 1983 applies and therefore are not wholly immune from suit under that statute.[5] Two years later, in *Owen v. City of Independence*,[6] the Court reaffirmed the rule in *Monell* and held that municipalities may not assert a qualified immunity, defense, or privilege based upon the good faith of the official involved in the deprivation of rights secured by the Constitution and laws.[7]

Consequently, it would seem that the only issue in any suit against a municipality under section 1983 is whether it has deprived the plaintiff of a protected constitutional or statutory right.[8] At first blush this is a simple question of causation. In both *Monell* and *Owen*, however, the Court emphasized that:

> [A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.[9]

Although neither *Monell* nor *Owen* necessarily involved an attempt to impose liability under a theory of respondeat superior, the Court in each case specifically precluded any attempt to premise future lawsuits on that theory.[10] The policy behind this rule is the result of two important observations. In *Owen*, the Court recognized that the effect of its earlier opinions allowing public officials to assert a good faith defense in actions for damages was to leave many victims remediless.[11] The Court noted that this was particularly true when the injury resulted from the interaction of several government officials, each of whom acted in good faith.[12] The *Owen* Court stated that one particular benefit of abrogating a municipality's good faith defense is the prevention of "systemic" injuries in which the plaintiff has clearly suffered harm but liability could not be established against any individual officer.[13] On the other hand, the Court was equally concerned that the municipality might be held liable for the acts of an officer not actually "caused" by the municipality's policies.[14] The Court stated that it was thus allocating costs in a section 1983 action among the victim, the officer who caused the injury, and the public, as represented by the municipal entity. This allocation of costs is guided by the accommodation arrived at by the Court:

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[4] 436 U.S. 658 (1978).

[5] The Supreme Court has stated in dictum that the *Monell* ruling is not applicable to the states or to state governmental entities. Justice Brennan had previously indicated he would favor such an extension. Hutto v. Finney, 437 U.S. 678, 703 (1978) (Brennan, J., concurring). *Cf.* Thompson v. New York, 487 F. Supp. 212, 226-27 (N.D.N.Y. 1979) (court reluctantly held that state is not a person under § 1983). Justice Rehnquist, joined by six other justices, emphasized in Quern v. Jordan, 440 U.S. 332, 341 (1979) that *Monell* was a limited ruling and had not authorized suits against states under § 1983. *See, e.g.*, Familias Unidas v. Briscoe, 619 F.2d 391, 405 (5th Cir. 1980) (court followed *Quern* in dismissing § 1983 suit against a state and county). For this reason this article will focus on city ordinances, policies, and local law enforcement problems. The same analysis would seem to apply, however, if *Monell* should be interpreted in the future to apply to state law enforcement activities.

[6] 445 U.S. 622 (1980).

[7] *Id.* at 638.

[8] The Supreme Court has now affirmatively resolved the question whether an action will lie under § 1983 for federal statutory violations. Maine v. Thiboutot, 100 S. Ct. 2503 (1980).

[9] 445 U.S. at 633 (citing Monell v. Department of Social Servs., 436 U.S. at 694).

> The innocent individual who is harmed by an abuse of governmental authority is assured that he will be compensated for his injury. The offending official, so long as he conducts himself in good faith, may go about his business secure in the knowledge that a qualified immunity will protect him from personal liability for damages that are more appropriately chargeable to the populace as a whole. And the public will be forced to bear only the costs of injury inflicted by "execution of a government's policy or custom, whether made by its lawmakers or by those

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[10] In only one previous case had the Supreme Court indicated that § 1983 liability could not be premised solely upon a respondeat superior rationale. *See* Rizzo v. Goode, 423 U.S. 362, 370-71, 376 (1976) (discussing the matter in the context of causation). *Rizzo* was not a suit for damages; the plaintiff had sought only to require supervisory officers to implement procedures to curb the incidence of police brutality by their subordinates.

[11] 445 U.S. at 651.

[12] *Monell* and *Owen* thus seem to open the door for a recovery, previously denied, against municipalities responsible for civil rights deprivations. *See, e.g.*, Burton v. Waller, 502 F.2d 1261, 1273 (5th Cir. 1974) (municipality not liable under § 1983 for shooting deaths of college students at hands of city police), *cert. denied*, 420 U.S. 964 (1975).

[13] 445 U.S. at 651.

[14] 436 U.S. at 692 & n.57.

whose edicts or acts may fairly be said to represent official policy."[15]

The accommodation reached by the Court is not entirely trouble-free. It can be assumed that defendants will still try to create gaps in which a plaintiff may be wronged but no recovery is possible. Furthermore, even where a plaintiff has a clear case against an officer, he will still need to sue the public entity if his remedy for damages is not to be illusory. Unless the defendant official is self-insured or is covered by a municipal or union insurance policy, any judgment in the plaintiff's favor will likely be uncollectible, especially where the amount of the judgment is substantial. Therefore, if the plaintiff expects to recover for his injuries, the funds will have to come from the municipality.

This article will pursue these considerations in the context of police misconduct and will delineate the circumstances under which a municipality may be held responsible for the misconduct of its police officers. In the following discussion, three varieties of police misconduct will be addressed. The first variety involves the arrest or detention of a suspect pursuant to a municipal law or policy that is illegal on its face. The second variety consists of certain abuses of process by law enforcement officials, excluding police brutality cases. The third variety is the traditional police brutality case. Although the same *Monell-Owen* principles apply in each of these situations, the factual contexts are sufficiently diverse to justify considering each case separately. Finally, this article will discuss specific problems of pleading, proof, and remedies common to all three forms of action for police misconduct.

II. POLICE MISCONDUCT PURSUANT TO AN ORDINANCE OR POLICY ILLEGAL ON ITS FACE

A Jehovah's Witness distributes leaflets and is arrested by a police officer pursuant to a city ordinance banning the distribution of leaflets on public streets and sidewalks. Unable to post bond, the defendant is incarcerated until his appearance before the local magistrate when he is found guilty and fined fifty dollars. Although the defendant succeeds in having his conviction reversed on appeal,[16] this is the classic case where the innocent victim formerly was left without a remedy for damages. He could not sue the city council members who enacted the ordinance,[17] the prosecutor who charged him,[18] or the judge who found him guilty,[19] because they all enjoyed absolute immunity from suit. Similarly, the arresting officer's convincing defense was that he was enforcing an official city policy in good faith.[20] *Monell* and *Owen* now provide the Jehovah's Witness a remedy against the city, regardless of whether its officials knew or even should have known that the ordinance was unconstitutional.[21]

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[15] 445 U.S. at 657 (quoting Monell v. Department of Social Servs., 436 U.S. at 694).

Formerly, a city could pass with impunity an ordinance effectively prohibiting blacks from using municipal swimming pools[22] or barring vagrants or other "undesirables" from the city.[23] The ordinance would serve its intended purpose until someone successfully challenged the act's constitutionality. Even then the city might achieve the same result by instituting a different but equally objectionable law. The realization by city officials that injured parties can now recover damages in suits against municipalities under *Monell* and *Owen* should eliminate such blatant misconduct. In addition, under the balance struck in *Owen*, even those city officials who are conscientious will be forced to give greater consideration to the constitutional implications of the ordinances and policies which they choose to enforce. Consequently, if the officials harbor any doubts about the lawfulness of their intended action, they will have greater incentive "to err on the side of protecting citizens' constitutional rights."[24]

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[16] *See, e.g.*, Schneider v. State, 308 U.S. 147, 153-54, 165 (1939) (reversal of four convictions under city ordinances prohibiting or regulating the distribution of literature in public places).

[17] *See* Tenney v. Brandhove, 341 U.S. 367, 377 (1951) (legislative immunity); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 613-14 (8th Cir. 1980) (absolute immunity for municipal legislators).

[18] *See* Imbler v. Pachtman, 424 U.S. 409, 427 (1976) (prosecutors enjoy absolute immunity under § 1983).

[19] *See* Stump v. Sparkman, 435 U.S. 349, 356 (1978) (judicial immunity not abrogated by § 1983); Pierson v. Ray, 386 U.S. 547, 553-55 (1967) (same).

[20] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967) (common law defense of good faith available to police officers in § 1983 actions).

[21] The *Owen* opinion expressly rejected any defense by the municipality that its actions were "legislative" rather than "ministerial." 445 U.S. at 644. A defense by the municipality that the Jehovah's Witness assumed the risk of arrest and prosecution likewise would prove unsuccessful. Because the ordinance was void, the petitioner could properly ignore it without first resorting to an action in equity or a suit for declaratory relief. *See* Lovell v. Griffin, 303 U.S. 444, 452 (1938) (one may wait until charged to challenge an ordinance void on its face).

[22] *See* Palmer v. Thompson, 403 U.S. 217, 219 (1971) (closing of city pools to all persons).

[23] *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 161 (1972) (municipal vagrancy ordinance).

Municipal liability under *Monell* and *Owen* is not limited to those situations where a positive law enacted by the city is held unconstitutional on its face. As explained in parts III and IV of this article, a custom may also give rise to municipal liability "even though such a custom has not received formal approval through the body's official decision making channels."[25] Although not authorized by written law, customs are those practices of a municipality that are so permanent and well-settled as to transform merely private predilections into compulsory rules of behavior.[26] Thus, a city may well be answerable if it is the routine practice for police to stop blacks who are on the streets after dark in certain areas of the city.[27] The city would be liable regardless of whether the practice was instituted by the city council or by the police department itself.[28] If an agency or a department has the authority or, in a more informal sense, is free to set its own policies or priorities, its edicts and acts should represent "official policy" for which the city is ultimately responsible.[29] In *Owen*, the Court expressed the hope that the

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[24] 445 U.S. at 652.

[25] Monell v. Department of Social Servs., 436 U.S. at 691.

[26] *See* Adickes v. S.H. Kress & Co., 398 U.S. 144, 168 (1970). The Court, quoting Representative Garfield, stated that a "systematic maladministration" of laws equal and just on their face or a "neglect or refusal to enforce their provisions" could constitute a custom or usage within the ambit of § 1983. *Id.* at 167. The Court noted that the statute's scope was limited: although § 1983 was meant to provide a remedy for constitutional deprivations stemming from official failure to enforce duties owed under existing laws, it was not meant to provide a remedy for constitutional deprivations arising from official failure to enact corrective legislation. *Id.* at 167 n.39; *see* Supreme Court v. Consumers Union, 446 U.S. 719, 731-34 (1980) (Supreme Court of Virginia, acting in legislative capacity, enjoyed absolute legislative immunity for failure to lift ban against attorney advertising); Mayes v. Elrod, 470 F. Supp. 1188, 1192 (N.D. Ill. 1979) (liability for failure to enact corrective legislation not within scope of § 1983).

[27] In Rizzo v. Goode, 423 U.S. 362 (1976), minority citizens alleged a pervasive pattern of police mistreatment. The district court ordered city officials to draw up guidelines for handling citizen complaints alleging misconduct, and the Third Circuit affirmed. The Supreme Court, concluding there was no "affirmative link" between the misconduct complained of and the approval of municipal policymakers, reversed. *Id.* at 380-81. Thus, for instance, the all-white Chicago suburb of Cicero could be held liable for an injury to a black if it could be proven that the injury was caused by an official policy not to afford police protection to blacks who come into the town. *See* Thompson v. New York, 487 F. Supp. 212, 227 (N.D.N.Y. 1979) (withdrawal of police protection may be categorized as a

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policy under § 1983); Huey v. Barloga, 277 F. Supp. 864, 874 (N.D. Ill. 1967) (public officials are not always immune from suit for failure to provide police protection). Similarly, Cairo, Illinois might be liable for injuries suffered as a result of the concerted efforts of law enforcement officials to prevent blacks from exercising their first amendment right to protest racial injustice. *See* Littleton v. Berbling, 468 F.2d 389, 402 (7th Cir. 1972) (§ 1983 action against county officials for systematic discriminatory application of criminal law), *rev'd in part sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974).

In Mayes v. Elrod, 470 F. Supp. 1188 (N.D. Ill. 1979), a cause of action for damages was found to exist against Cook County, Illinois. A jail inmate sued the county and its officials for violating his eighth amendment rights. He alleged that living conditions in the Cook County Jail were inhumane and that, as a result of lax security and overcrowding, he had been subjected to assaults and rape. He further alleged that his injuries were directly caused by the defendants' continuing practice of underfunding county corrections programs. Judge Prentice Marshall denied the county's motion to dismiss. Finding a statutory duty on the part of the county to keep jails repaired and in suitable condition, the judge held that the persistent maladministration or nonenforcement of the county's mandatory duty could amount to an official custom within the scope of § 1983. *Id.* at 1193.

[28] *See* Sala v. County of Suffolk, 604 F.2d 207 (2d Cir. 1979), *cert. granted, vacated and remanded*, 446 U.S. 903 (1980) (remanded for further consideration in light of *Owen*). The Second Circuit had held that the county was not liable in damages for a policy of the sheriff's department requiring the strip search of all women taken into custody because the department had adopted the policy in good faith. 604 F.2d at 209-11.

[29] The court in Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir.), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979), held that "a damage action can be maintained against a municipality to redress injuries resulting from those actions of its employees that have been authorized, sanctioned or ratified by municipal officials or bodies functioning at a policy-making level." 579 F.2d at 164. However, the district court in Smith v. Ambrogio, 456 F. Supp. 1130 (D. Conn. 1978), narrowly construed *Turpin* to refer only "to those making what can realistically be considered the policy of the town, rather than all officials at any level of authority within the town government exercising discretion and thereby in some sense creating policy guiding the actions of subordinates." *Id.* at 1134. *Smith* was decided before the Supreme Court's most recent decision in *Owen*.

The determination of who makes official policy for the city will presumably be a mixed question of law and fact decided on a case-by-case basis. *See* Schneider v. City of Atlanta, 628 F.2d 915, 920 (5th Cir. 1980) (city sued for racial discrimination in discharge of employee; whether director of bureau of corrections had final authority to make personnel decisions was question of fact); Stinson v. Sheriff's Dep't, 499 F. Supp. 259, 265 (S.D.N.Y. 1980) (whether official policy existed dependent on surrounding facts and cir-threat of damages would encourage those in policy-making positions to institute internal rules and programs designed to minimize the likelihood of objectionable conduct by their subordinates.[30] Thus, the Court issued a clear warning: municipalities cannot insulate themselves from liability by allowing policies to be shaped informally by subordinate officials rather than taking action at the top.[31] Whichever course a city chooses as a way of defining city policy that policy is "officially" the city's, and the public will be called upon to bear the cost of it.

III. ABUSES OF PROCESS

A second variety of police-citizen tension is created when the police violate personal rights while enforcing an otherwise valid law or custom. Generally included in this category are those situations where the officer makes an illegal arrest under an otherwise valid city ordinance. For example, in *Gregory v. City of Chicago*,[32] police enforced a disorderly conduct ordinance against civil rights protestors in violation of the demonstrators' first amendment rights. Similarly, in *Cantwell v. Connecticut*,[33] a Jehovah's Witness who played a recording offensive to Catholics was arrested for inciting a breach of the peace. Recovery of damages against individual officers would be difficult in both situations. Nevertheless, these appear to be the very situations in which the *Owen* Court intended the municipality to

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cumstances). State laws and municipal ordinances allocating power and delegating responsibilities as well as actual practices will be relevant to the policy-making power determination. If a single official's judgment can be said to bind the city, then the city should be required to accept the responsibility. *See* Schnapper, *Civil Rights Litigation after Monell,* 79 COLUM. L. REV. 213, 215-40 (1979) (factors relevant to a determination of who represents city or county policy); Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980) (judge's enforcement of state statute not a policy-making act). *But see* Katris v. City of Waukegan, 498 F. Supp. 48, 52 (N.D. Ill. 1980) (mayor's actions, pursuant to authority conferred by city council, were those of municipality).

[30] 445 U.S. at 652.

[31] *Id.* On the facts, the *Owen* Court rejected a narrow definition of "official" action. The Court concluded that the discharge of police chief Owen by the city manager, in violation of Owen's procedural and substantive due process rights, was concerted, systematic conduct that could be said to represent "official" city policy. *Id.* at 657.

[32] 394 U.S. 111, 112 (1969).

[33] 310 U.S. 296, 301-03 (1940).

be liable.[34] If the arrest was ordered as part of a pervasive scheme to harass demonstrators, then "official" liability is clear.[35] Similarly, even if the decision to arrest was an individual officer's, it still was an "official" determination to take someone into custody.[36] This is particularly true where the city ratifies the arrest by prosecuting the person arrested rather than discharging him.[37] In this situation, the municipality is unquestionably directing the illegal proceeding.

An abuse of process may also occur where an officer errs in determining whether probable cause exists for an arrest or search. For example, an officer's arrest of a man for burglary on only the most general of descriptions,[38] or an entry into a private home without a warrant in order to arrest a suspect,[39] may constitute an abuse of process. Although liability for damages can be imposed against an officer who acts in an unreasonable manner,[40] a favorable verdict will be meaningless if the defendant is judgment proof. Because immunity is unavailable to the public entity as a defense[41] and because the city has a "deeper pocket" than any individual officer, victims of police misconduct are finding it increasingly attractive to sue the municipality.

The defense which the municipality will invariably raise is that liability cannot be premised on a theory of respondeat superior[42] and that a local governmental entity can be liable only for the execution of its "official" policies and customs.[43] The municipality will deny that the officer acted pursuant to "official" policy and indeed will attempt to show that he violated "official" policy in making the illegal search or seizure.[44] The municipality, in a futile attempt to regain immunity, may also try to introduce legislation requiring officers to act in accordance with the laws and the Constitution of the United States.[45]

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[34] 445 U.S. at 657-58.

[35] *See* Allee v. Medrano, 416 U.S. 802, 811, 815 (1974) (Court affirmed injunction against policy upon a showing of persistent pattern of police misconduct); Hague v. CIO, 307 U.S. 496, 505, 517 (1939) (injunctive relief ordered against city officials who adopted and enforced a policy forbidding plaintiffs from holding public meetings in city).

[36] *See* notes 46 through 49 and accompanying text *infra.*

[37] *See* note 49 and accompanying text *infra.*

[38] People v. Byrd, 47 Ill. App. 3d 804, 365 N.E.2d 443, 446 (App. Ct. 1977); *see* Delaware v. Prouse, 440 U.S. 648, 648 (1979) (random stop of motorist in absence of specific articulable facts justifying the stop held constitutionally impermissible); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969) (evidence was inadmissible where police detained petitioner and obtained fingerprints without probable cause).

[39] Payton v. New York, 445 U.S. 573, 574-75 (1980).

[40] *Compare* Pierson v. Ray, 386 U.S. 547, 557 (1967) (if officers "reasonably believed in good faith" that arrest was constitutional, they could not be held liable if arrest was in fact unconstitutional) *with* Butler v. Goldblatt Bros., 589 F.2d 323, 325-26 (7th Cir. 1978) (arrest made without probable cause; good faith defense under § 1983 inapplicable), *cert. denied,* 444 U.S. 841 (1979) *and* Joseph v. Rowlen, 402 F.2d 367, 370 (7th Cir. 1968) (police officer liable for damages where arrest made without a warrant or probable cause).

[41] Owen v. City of Independence, 445 U.S. at 657.

The city's defense should not be accepted. One can argue that the officer who performs an arrest or a search does so as an "official" representative of the public. His judgment may indeed be erroneous, but he has been designated to make that judgment on the public's behalf. Just as a city council or county legislature has been delegated power "officially" to enact ordinances,[46] and just as a city manager has been delegated power "officially" to discharge a municipal employee,[47] so a police officer has been delegated power "officially" to make arrests and conduct searches. In this narrow sphere, his edicts and acts represent official policy for which the public should be ultimately answerable.[48] Again, this is especially true when the city subsequently ratifies the policeman's conduct by prosecuting the person arrested. The city should not be permitted to dispute the extent of the officer's authority. If the city intends to use the fruits of an arrest or search to prosecute wrongdoers, then it should be willing to accept the consequences should the arrest or search be deemed illegal. Thus, the only way a municipality should be allowed to limit its liability is to withdraw completely the police officer's power to arrest or search.[49]

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[42] *E.g.*, Monell v. Department of Social Servs., 436 U.S. at 691. The Court stated: "a municipality cannot be held liable solely because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under § 1983 on a respondeat superior theory." *Id.*

[43] *Id.* at 690-91.

[44] *Cf. Ex parte* Young, 209 U.S. 123, 159-61 (1908) (if state official's acts are unconstitutional, he is individually answerable for his acts).

[45] Schnapper, *supra* note 29, at 231.

[46] Monell v. Department of Social Servs., 436 U.S. at 690.

[47] Owen v. City of Independence, 445 U.S. at 663 & n.13.

[48] *Id.* at 654-55, 657. *Compare* Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir. 1978) (municipality liable in damages when its employees' actions authorized, sanctioned, or ratified at municipal policy-making level) *with* Smith v. Ambrogio, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (city officials who possess authority or exercise discretion do not necessarily make town policy).

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[49] The authorities have not adopted such a policy. In Familias Unidas v. Briscoe, 619 F.2d 391, 404 (5th Cir. 1980), a county judge, in compliance with a county school board request and pursuant to an unconstitutional Texas statute, exacted disclosure of the membership lists of organizations that sought to interfere with the operation of public schools. In a suit for damages under § 1983, the Fifth Circuit held for the county. The court reasoned that the judge had not acted in a capacity in which his "edicts or acts may fairly be said to represent official [county] policy." *Id.* at 404 (quoting Monell v. Department of Social Servs., 436 U.S. at 694). Instead, the judge was enforcing "the policy of the State of Texas . . . , for which the citizens of a particular county should not bear singular responsibility." 619 F.2d at 404.

One commentator argues for an intermediate position. *See* Schnapper, *supra* note 29, at 221-23. He reasons that a city should be held liable where it allows officers to make ad hoc decisions but not where it has enacted specific rules and regulations circumscribing the authority of the officer. *Id.* at 221-22. While this argument is sound in the abstract, it is doubtful that sufficiently specific rules could be enacted to curtail or eliminate judgments by individual officers. *Id.* at 222-23. Additionally, in most instances the city will readily accept the officer's judgment if it is ultimately upheld by the courts but repudiate it if it is not.

In suits for damages against a municipality, the plaintiff may also argue that his arrest or search was part of a city-wide policy or custom which supported false arrests or illegal searches. Ellis v. City of Chicago, 478 F. Supp. 333, 335-36 (N.D. Ill. 1979) (amended complaint presented factual question whether repeated fourth amendment violations perpetrated against plaintiffs by Chicago police constituted city "policy or custom"). *See* Part II of text and accompanying footnotes *supra*. As further developed in Part IV *infra*, the plaintiff can also argue that the municipality by its inaction has improperly trained or supervised its officers, or has shown "deliberate indifference" to or ratified the conduct of its officers, or in some other way has directly contributed to the injury sustained by the plaintiff.

The same reasoning that would hold a municipality liable for abuses of process committed by police officers would hold a city liable when a prosecutor secures an indictment or conviction by the knowing use of perjured testimony. While public policy supports an absolute immunity for the prosecutor, *see* Imbler v. Pachtman, 424 U.S. 409, 427 (1976), no similar public policy supports an immunity for the local governmental entity.

Of course, in all of these cases, municipal liability is premised on the invasion of a right protected by the laws or Constitution of the United States. Thus, an innocent person arrested pursuant to a valid warrant or with probable cause probably cannot recover under § 1983. *See* Pierson v. Ray, 386 U.S. 547, 555, 557 (1967) (police officers' common law defenses preserved under § 1983); *cf.* Baker v. McCollan, 443 U.S. 137, 146 (1979) (§ 1983 imposes liability for violations of rights secured by the Constitution, not for violations of duty of care). However, the Court in *Baker* left open the question whether extended confinement after authorities reasonably should have determined that a detainee is innocent would violate a constitutionally protected liberty interest. *Id.* at 145. In such a situation, the police and jailer probably have a good faith defense, *see* note 40 *supra*, while the judge and prosecutor enjoy absolute immunity. Stump v. Sparkman, 435 U.S.

The argument for an extension of municipal liability is supported by the Court's opinion in *Owen*. Although the Court expressed hope that the threat of liability would increase the attentiveness with which higher officials supervise their subordinates[50] and would "encourage those in a policymaking position to institute internal rules and programs designed to *minimize* the likelihood of unintentional infringements on constitutional rights,"[51] it did not imply that by instituting such measures the municipality necessarily would escape liability. This conclusion is buttressed by the Court's adoption of the loss-spreading principle that "when it is the local government itself that is responsible for the constitutional deprivation—it is perfectly reasonable to distribute the loss to the public as a cost of the administration of government, rather than to let the entire burden fall on the injured individual."[52] Imposition of liability upon the municipality in these situations will further the objective articulated by the Court—that innocent individuals should be assured compensation for injuries sustained as the result of an abuse of governmental authority.[53]

IV. Police Brutality

The third variety of police misconduct can be denominated police brutality. Distinguished from the situation in which the officer acted pursuant to a law or custom unconstitutional on its face or the situation involving an illegal arrest or search, it is unlikely that a finder of fact will conclude that an officer acted in good faith when the latter beat a suspect. Nonetheless, the reasons discussed earlier for trying to impose liability on the public entity are especially applicable here. Since damages resulting from police brutality can be substantial, it is crucial to find a "deep pocket" in these cases. Furthermore, the potential for such abuses should be minimized if municipal treasuries are

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349, 363-64 (1978); Imbler v. Pachtman, 424 U.S. 409, 427 (1976). Again, this is the type of systemic injury, referred to in *Owen*, where liability should be borne by the public. 445 U.S. at 657-58.

[50] 445 U.S. at 652 n.36.

[51] *Id.* at 652 (emphasis added).

[52] *Id.* at 655 n.39.

[53] *Id.* at 657.

threatened. However, the Court in *Monell* expressly rejected premising municipal liability on a theory of respondeat superior.[54] An argument can and should be made that, when the city has failed to promulgate specific rules to prevent police brutality, it has delegated that power to the officers. However, the lower courts, rejecting the theory that officers automatically are policymakers in such instances, have required plaintiffs to demonstrate that the municipality caused the unconstitutional deprivation.[55] As the existing decisions indicate, this is not an easy task.

To establish liability against a municipality, it is generally required that there be some "affirmative link" between the actions or policies of the city and the unconstitutional deprivation.[56] The municipality will be held responsible only if it is shown to be "culpable" in its own right.[57]

The easiest way to establish an "affirmative link" or "culpability" is to show an articulated policy favoring or promoting police brutality. Such an articulated policy may be shown through a state statute or city ordinance authorizing unconstitutional conduct[58] or through a police department regulation outlining unconstitutional procedures.[59] For obvious reasons, the cases where such an affirmative link can be established will be rare.

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[54] Monell v. Department of Social Servs., 436 U.S. at 691.

[55] *See, e.g.*, Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (federal prisoner, injured by corrections officers while in county jail, stated a cause of action for deprivation of rights); Turpin v. Mailet, 579 F.2d 152, 168 (2d Cir.) (municipality liable for unconstitutional arrest of appellant where employees' actions were authorized or sanctioned at the policy-making level), *vacated*, 439 U.S. 988 (1978), *modified and remanded*, 591 F.2d 426 (2d Cir. 1979); Molina v. Richardson, 578 F.2d 846, 847-48 (9th Cir. 1978) (city immune from suit where plaintiff failed to argue that police officers' allegedly illegal conduct could fairly be said to represent the city's official policy); Knight v. Carlson, 478 F. Supp. 55, 58 (E.D. Cal. 1979) (county may be liable if employees of sheriff's department were untrained as a result of county policy); Popow v. City of Margate, 476 F. Supp. 1237, 1246 (D.N.J. 1979) (city may be liable if its procedure for reprimand is so inadequate as to ratify unconstitutional conduct by police officers); Leite v. City of Providence, 463 F. Supp. 585, 591 (D.R.I. 1978) (municipality may be held liable if training of police force was nonexistent, reckless, or grossly negligent).

[56] Rizzo v. Goode, 423 U.S. 362, 371, 376 (1976) (mere right to control, without exercise of control or failure to supervise, insufficient to establish § 1983 liability).

[57] Turpin v. Mailet, 579 F.2d 152, 166 (2d Cir. 1978).

[58] *See* Garner v. Memphis Police Dep't, 600 F.2d 52, 53 (6th Cir. 1975) (statute authorized officers to shoot fleeing felons).

[59] In Duchesne v. Sugarman, 566 F.2d 817, 832 (2d Cir. 1977), the court held that

In most cases, therefore, "culpability" will have to be proven either by demonstrating that city policymakers affirmatively intervened to cause the abuse, or by showing such a pervasive pattern and practice of abuse as to indicate a city policy which supports it.[60] In either situation, the familiar tort principle that one intends the natural consequences of his acts should govern.

One can establish municipal "culpability" by showing that persons in policymaking positions have affirmatively directed the misconduct.[61] In some situations policymakers will single out special groups for harassment. For instance, in *Hague v. CIO*,[62] the Supreme Court found that the mayor, the director of public safety, the police chief, and city commissioners were collectively engaged in a policy of harassing labor organizers.[63] Similarly, in *Allee v. Medrano*,[64] the Court found a continuing pattern of harassment and violence by the Texas Rangers against farm union organizers.[65] If city policymakers are directly implicated in such actions, liability should be clear. Liability will be more difficult to establish, however, where it is premised on a theory that officials, by their inaction, have allowed such practices to persist. In

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plaintiffs could try to show that policies and procedures in a welfare manual proximately caused the unconstitutional action of city welfare workers in taking and retaining custody of plaintiffs' children without benefit of a hearing or court order.

[60] *See* Monroe v. Pape, 365 U.S. 167, 187 (1961) (overruled on other grounds by *Monell*); *cf.* Schnell v. City of Chicago, 407 F.2d 1084 (7th Cir. 1969), where the court stated: "From a legal standpoint, it makes no difference whether the plaintiff's constitutional rights are violated as a result of police behavior which is the product of the active encouragement and direction of their superiors or as a result of the superiors' mere acquiescence in such behavior." *Id.* at 1086.

[61] *See* Turpin v. Mailet, 579 F.2d 152, 164 (2d Cir. 1978) (actions authorized, sanctioned, or ratified by municipal policy-making officials or bodies). It is sometimes difficult to determine whether an official is a policymaker. Certainly police chiefs, especially those authorized to formulate department policy, should be considered policymakers under *Monell* and *Owen*. The policy-making status of officials at lower levels of the municipal hierarchy should be judged on the facts of each case. *But cf.* Smith v. Ambrogio, 456 F. Supp. 1130, 1134 (D. Conn. 1978) (construing *Turpin* to refer only to those officials who institute town policy and not officials at every level).

[62] 307 U.S. 496 (1939).

[63] *Id.* at 505.

[64] 416 U.S. 802 (1974).

[65] *Id.* at 804-09.

Rizzo v. Goode,[66] plaintiffs produced approximately 250 witnesses to testify to numerous incidents of brutality by Philadelphia police officers. Nonetheless, the Supreme Court refused to find any "affirmative link" between those occurrences and the adoption of any plan or policy—"express or otherwise—showing . . . approval of such misconduct."[67]

Municipal inaction, manifested in a failure to train or supervise officers properly, may be the direct cause of a deprivation of civil rights. Similarly, municipal inaction in the face of a pervasive pattern or practice of police brutality may denote official acquiescence in or ratification of that misconduct. Despite apparent improprieties by officials, the possibility of imposing liability in these circumstances is still uncertain.[68]

Supervisory officials have been found culpable for inaction when laws or regulations of the state or locality impose a duty to act and the officials' inaction results in an unconstitutional deprivation.[69]Hence, if there is a breach of state laws requiring minimum police training, supervision, or other standards of conduct, courts have imposed liability. However, caution in relying on these precedents is advised. Some language in *Rizzo* indicates that mere inaction, even though premised on a breach of duty, will still not be sufficient to establish supervisory responsibility.[70] Recently, however, the Court in *Monell* construed the language in *Rizzo* to mean only that "the mere right to control without any control or direction having been exercised and without any failure to supervise is not enough to support § 1983 liability."[71] This has led one lower court to conclude that inaction combined with the exercise of some control may be a sufficient basis upon which to found supervisory responsibility.[72]

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[66] 423 U.S. 362 (1976).

[67] *Id.* at 371. *Compare id.* (no official custom or policy linked to illegal conduct by police officers) *with* Ellis v. City of Chicago, 478 F. Supp. 333, 336 (N.D. Ill. 1979) (amended complaint, citing four specific instances in which officers invaded plaintiffs' fourth amendment rights, may have illustrated a "custom or policy").

[68] *See, e.g.*, Turpin v. Mailet, 619 F.2d 196, 202-04 (2d Cir. 1980) (although official policy may be inferred from omissions of municipal officials, police commissioner's failure to discipline officer insufficient to establish indifference to rights of arrestee); Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979) (superior's failure to act insufficient to establish liability in absence of a pervasive, regular pattern of violations); Smith v. Ambrogio, 456 F. Supp. 1130, 1135-37 (D. Conn. 1978) (same).

In Duchesne v. Sugarman, 566 F.2d 817 (2d Cir. 1977), the court stated:

> Where conduct of the supervisory authority is directly related to the denial of a constitutional right it is not to be distinguished, as a matter of causation, upon whether it was action or inaction. . . . "[N]o State may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be. It is of no consolation to an individual denied the equal protection of the laws that it was done in good faith. . . . By its inaction, the Authority, and through it the State, has not only made itself a party to the refusal of service, but has elected to place its power, property and prestige behind the admitted discrimination."

Id. at 832 (quoting Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961)).

[69] *See, e.g.*, Sims v. Adams, 537 F.2d 829, 832 (5th Cir. 1976) (plaintiff stated § 1983 cause of action against mayor and police chief for negligent failure to control officer with known propensity for use of force); Roberts v. Williams, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971); Carter v. Carlson, 447 F.2d 358, 365 (D.C. Cir. 1971) (cap-

Courts have not hesitated to impose liability for inaction which is so reckless or so grossly negligent as to show "deliberate indifference."[73] For example, providing line officers with firearms without giving them any training or instruction on their use

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tain and chief of police subject to § 1983 suit for negligent failure to train officer who deprived plaintiff of constitutional rights), *rev'd on other grounds,* 409 U.S. 418 (1973); Moon v. Winfield, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (chief of police subject to § 1983 suit for negligent failure to act on 13 misconduct complaints against a single officer); *cf.* Duchesne v. Sugarman, 566 F.2d 817, 832 n.31 (2d Cir. 1977) (question presented whether state and local law imposed duty on commissioner of welfare bureau to control employees who took children from mother and retained custody without her consent).

[70] *See* Rizzo v. Goode, 423 U.S. at 376 (plaintiff's theory of recovery blurred issues and amounted to an amorphous proposition which the Court declined to consider).

[71] 436 U.S. at 694 n.58.

[72] Mayes v. Elrod, 470 F.Supp. 1188, 1194 (N.D. Ill. 1979).

[73] Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979); Mayes v. Elrod, 470 F. Supp. 1188, 1194 (N.D. Ill. 1979); Leite v. Providence, 463 F. Supp. 585, 590-91 (D.R.I. 1978); Perry v. Elrod, 436 F. Supp. 299, 302 (N.D. Ill. 1977). The "deliberate indifference" standard was articulated by the Supreme Court in Estelle v. Gamble, 429 U.S. 97, 106 (1976), a suit against prison officials under the eighth amendment for their failure to provide medical care to penitentiary inmates. However, in Edmonds v. Dillin, 485 F. Supp. 722 (N.D. Ohio 1980), the court held that the "deliberate indifference" standard should be limited to eighth amendment cases and formulated its own standard for "police training" cases:

> If a municipality completely fails to train its police force, or trains its officers in a manner that is in reckless disregard of the need to inform and instruct police officers to perform their duties in conformity with the constitution, and if the municipality might reasonably foresee that unconstitutional actions of its police officers might be committed by reason of the municipality's failure or reckless disregard, then the municipality would have implicitly authorized or acquiesced in such future unconstitutional acts.

Id. at 727.

might well be so reckless as to evidence "deliberate indifference" to the rights of the public on the part of those in authority.[74] "Deliberate indifference," while most easily established in pattern and practice cases, may also be proved by a single incident.[75]

A final way to establish municipal "culpability" is to show that the city has ratified police misconduct.[76] As discussed above, such culpability may be difficult to establish simply by showing inaction by the city, *i.e.*, that it has failed to set up a police review mechanism. However, if a city creates such a program, its failure to administer it properly may be actionable.[77] Ratification may also be found where the city or its police review board consistently condones police misconduct despite repeated complaints or where the city rewards or promotes officers who engage in police brutality.

In the final analysis, whichever theory one employs for imposing liability against municipalities for police brutality, proof of causation will be the key to recovery.[78] Has the plaintiff's injury resulted from some fault of the municipality itself?[79] If the officer truly acted on his own, plaintiffs presumably will have to be content with recovering damages from him alone.[80] If one can demonstrate, however, that the city, through its "policy-making" officials, either directed or in a meaningful way allowed the brutality to occur, then the city should be held culpable.[81] In *Owen*, the Court suggested that the threat of damages will encourage cities to institute internal procedures to minimize abuses and will encourage officials at higher levels to supervise more closely the conduct of their subordinates.[82] In cases involving municipal culpability, the courts should recognize that police brutality is less likely to occur if officers are properly trained and supervised and if the department has adopted and enforced strict policies prohibiting police misconduct. The absence of such checks and protections should establish a prima facie case of municipal liability.[83] *Owen* clearly indicates that municipalities cannot insulate themselves from liability by declining to take action at the top,[84] and simple justice demands that the person injured by municipal action or inaction be compensated.

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[74] *Cf.* Roberts v. Williams, 456 F.2d 819, 822-23 (5th Cir.) (superintendent of prison farm negligently failed to train guard in use of weapon), *cert. denied*, 404 U.S. 866 (1971).

[75] *Compare* Turpin v. Mailet, 619 F.2d 196, 202 & n.7 (2d Cir. 1980) (a single incident may establish a basis for liability) *and* Owens v. Haas, 601 F.2d 1242, 1246 (2d Cir. 1979) (same) *with* Popow v. City of Margate, 476 F. Supp. 1237 (D.N.J. 1979) (rejecting view that a single brutal incident is sufficient to establish municipal liability).

[76] Turpin v. Mailet, 619 F.2d 196, 201 (2d Cir. 1980); Cook v. City of Miami, 464 F. Supp. 737, 739 (S.D. Fla. 1979).

[77] *See* Popow v. City of Margate, 476 F. Supp. 1237, 1247 (D.N.J. 1979) (city's inadequate maintenance of its review procedure for police shooting incidents may have led officers to believe their unconstitutional conduct would not subject them to any discipline).

[78] *See* Monell v. Department of Social Servs., 436 U.S. at 691 (municipality cannot be held liable on basis of respondeat superior; constitutional tort must be caused by official policy).

[79] *Id.; see* notes 54 through 78 and accompanying text *supra.*

[80] 436 U.S. at 691; *see* notes 54 through 57 and accompanying text *supra.*

V. PLEADING AND PROOF

Because municipal liability under section 1983 is such a recent development, many of the reported cases have involved preliminary questions of pleading. Although the federal rules require that pleadings be "simple, concise, and direct,"[85] some courts have required that a cause of action against a municipality be pled with greater specificity.[86] Thus, in *Smith v. Ambrogio*,[87] the Federal District Court for the District of Connecticut ruled that the complaint should state facts which clearly articulate the level of decisionmaking or the identity of agents whose actions are deemed to reflect town policy. The court found that in a pattern and practice case this was justified to ensure that neither the court nor the municipality be burdened with an unwarranted action.[88] Although this special rule is not in accord with the federal policy favoring notice pleading,[89] plaintiffs nevertheless are well advised to be as specific as possible in their pleadings.

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[81] *See* notes 60 through 78 and accompanying text *supra*.

[82] 445 U.S. at 652.

[83] *See generally* Schnapper, *supra* note 29, at 223.

[84] *See* Owen v. City of Independence, 445 U.S. at 652 (encouraging programs to minimize possibility of constitutional violations).

[85] FED. R. CIV. P. 8(3) (1).

[86] *See* Smith v. Ambrogio, 456 F. Supp. 1130, 1137 (D. Conn. 1978) (requirement of fact pleading appropriate; pleader must specify overt acts forming basis of unconstitutional action); *cf.* Leite v. City of Providence, 463 F. Supp. 585, 591 (D.R.I. 1978) (allegations of simple negligence insufficient to state a claim against municipality under § 1983).

[87] 456 F. Supp. 1130 (D. Conn. 1978).

Assuming that the pleadings adequately state a cause of action, the plaintiff then must determine what evidence can be garnered to prove the city's responsibility. As previously explained, the evidence required to establish the existence of an official policy will depend on the character of the misconduct alleged. The existence of a city policy need be proven only by a preponderance of the evidence.[90]

The best evidence of an official policy would be a city ordinance or authorized police regulation approving the particular conduct.[91] If such proof does not exist, then the plaintiff can try to establish such a policy by implication. For example, the absence of any standards or checks governing police action may demonstrate the city's indifference to citizens' rights.[92] Although a city cannot insulate itself from liability merely by announcing that officers should not engage in misconduct, the city's silence, especially when coupled with other evidence indicating a pervasive pattern or practice of abuse, may evidence an official city policy that fosters police misconduct.[93]

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[88] *Id.* at 1137.

[89] *E.g.*, Conley v. Gibson, 355 U.S. 41, 47-48 (1957) (notice pleading under federal rules does not require detailed facts; discovery and pretrial procedures are the means for determining the basis of the claim). With regard to notice pleading in the context of § 1983 actions against municipalities, see Thompson v. Village of Evergreen Park, 503 F. Supp. 251, 252 (N.D. Ill. 1980) (Federal Rules of Civil Procedure do not require specific allegations in § 1983 actions); Thompson v. New York, 487 F. Supp. 212, 217 (N.D.N.Y. 1979) (lack of specific allegations of defendant's tortious conduct not fatal under liberal approach of Rule 8(f)); Edmonds v. Dillin, 485 F. Supp. 722, 728 (N.D. Ohio 1980) (same). In Littleton v. Berbling, 468 F.2d 389 (7th Cir. 1972), *rev'd in part sub nom.* O'Shea v. Littleton, 414 U.S. 488, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974), defendants objected to a civil rights complaint because it did not contain "highly specific factual averments." The Seventh Circuit commented that the purpose of federal pleadings is to avoid the semantical donnybrooks inherent in differentiating what is evidence, ultimate facts and conclusions of law and fact . . . ." and that "dismissal should be sparingly used whenever it appears that a basis for federal jurisdiction in fact exists or may exist and can be stated by plaintiff." 468 F.2d at 394.

[90] *Cf.* Kerr v. City of Chicago, 424 F.2d 1134, 1139-40 (7th Cir.) (upholding jury instruction on this and other points), *cert. denied*, 400 U.S. 833 (1970).

[91] *Cf.* Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978) (formal approval through the municipal policy-making process).

[92] *See* notes 68 through 75 and accompanying text *supra*.

The likelihood of recovery against a municipality increases if the misconduct is traced to someone high in the chain of command.[94] Thus, an effort should be made to identify all city officials who participated in the acts that caused the deprivation of rights. Similarly, evidence tending to show a high degree of autonomy on the part of these officers will be necessary. The greater the policy-making discretion of the official, the more likely it is that he will be found to have acted in an "official" capacity.[95] Although the best evidence of an official's authority is the city's own ordinances or regulations, his authority can also be shown from his employment agreement with the city, directions he has received from those in official positions, or longstanding practices.

Plaintiffs should discover whether the city has properly trained and supervised its officers.[96] It also would be advisable to discover whether municipal officers have been involved in similar incidents.[97] In this regard, police documents relating to citizens' complaints and internal investigations may be helpful in proving municipal culpability.[98] Official ratification of an officer's misconduct may also be shown by evidence either that the city relied on the fruits of its officer's misconduct to prosecute the plaintiff or that the manner of conducting investigations is designed to justify the misconduct.

Rizzo v. Goode[99] illustrates the difficulty of proving supervisory responsibility where the evidence reveals only a number of unrelated incidents occurring in a large metropolitan area. Internal complaints and investigations may be helpful in establishing a pattern and practice.[100] Problems may be reduced if the plaintiff concentrates on proving only that an illegal official policy or practice exists in a particular neighborhood within a metropolitan area, or against a particular racial or ethnic group.[101] Prison and other institutional cases demonstrate that a pattern and practice can be proven by repeated incidents occurring in an institutional setting.[102] Also, proof may be facilitated if the plaintiff concentrates on one established police practice rather than on system-wide failures.[103]

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[93] *See* note 68 *supra*.

[94] *See* note 61 *supra*.

[95] *Id.*

[96] *See* note 69 *supra*.

[97] Evidence of similar incidents should be admissible at trial pursuant to FED. R. EVID. 404(b) and 406.

[98] *See* Moon v. Winfield, 368 F. Supp. 843, 845 (N.D. Ill. 1973) (police department documents used to show police superintendent's negligence in failing to act on brutality complaints); *cf.* Kerr v. United States Dist. Court, 511 F.2d 192, 196 (9th Cir. 1975) (prison board personnel files discoverable in suit attacking members' qualifications), *aff'd*, 426 U.S. 394 (1976).

[99] 423 U.S. 362 (1976). In *Rizzo*, plaintiffs offered evidence of the unconstitutional conduct of individual police officers. The police officers were not made parties to the action; rather, the defendants were the Mayor of Philadelphia and the police commissioner. The Court held that plaintiffs had failed to prove an "affirmative link between

The first cases brought against a particular municipality will require extensive discovery. Consequently, it may be worthwhile to establish a local clearinghouse procedure for sharing information secured in other cases. Even though each case will have its own particular problems of proof, such a procedure may never-

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the occurrence of the various incidents of police misconduct and the adoption of any plan by [defendants] showing their authorization or approval of such misconduct." *Id.* at 371.

[100] *See, e.g.,* Boyd v. Gullett, 64 F.R.D. 169, 177-78 (D. Md. 1974) (discovery of police investigative files permitted in civil rights case charging a systematic pattern of police brutality aimed at blacks); Frankenhauser v. Rizzo, 59 F.R.D. 339, 345-46 (E.D. Pa. 1973) (civil rights case against police officers and officials; court granted plaintiff's request to discover police department investigative files); Wood v. Breier, 54 F.R.D. 7, 9-10 (E.D. Wis. 1972) (plaintiffs in civil rights action entitled to discover police department investigative file).

[101] *See* Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1065-66 (7th Cir. 1976) (proof of individual instances of mistreatment of Mexicans by officials of the Immigration and Naturalization Service sufficient to support preliminary injunction), *aff'd and modified,* 548 F.2d 715 (7th Cir. 1977).

[102] *See, e.g.,* Dimarzo v. Cahill, 575 F.2d 15, 17-21 (1st Cir.) (unconstitutional prison conditions shown by evidence of inhumane living facilities and recreation procedure), *cert. denied,* 439 U.S. 927 (1978); Jackson v. Bishop, 404 F.2d 571, 572-80 (8th Cir. 1968) (evidence of prison's policy of whipping prisoners with strap established eighth amendment violation); Rogers v. Okin, 478 F. Supp. 1342, 1366-83 (D. Mass. 1979) (evidence of procedures for commitment, regulations concerning treatment, and medication practices sufficient to show state mental hospital violated patients' constitutional rights); Rennie v. Klein, 476 F. Supp. 1294, 1308-11 (D.N.J. 1979) (proof of procedure concerning patients' refusal of medication established violation of constitutional rights at state mental hospital).

[103] *See* Lyons v. City of Los Angeles, 615 F.2d 1243, 1245-50 (9th Cir.) (plaintiff attacked police practice of using strangleholds in non-life-threatening situations), *cert. denied,* 101 S. Ct. 333 (1980).

theless serve to expedite litigation.

VI. REMEDIES

Section 1983 provides that plaintiffs may sue for redress in either law or equity.[104] Thus, the possible remedies against police misconduct include injunctive relief, a declaratory judgment, or damages.

Because common law immunities do not apply to municipalities,[105] a victim of police misconduct almost certainly will want to sue the municipality for damages. Although the Supreme Court indicated that common law tort rules regarding damages apply in section 1983 actions,[106] it has also stated that rules governing compensation for injuries caused by the deprivation of constitutional rights should correspond to the particular constitutional interests in question.[107] Furthermore, the Court has indicated that the question of damages will be determined by federal standards as provided by 42 U.S.C. section 1988.[108] However, the Court has construed section 1988 to allow application of either damages rule in order to fulfill the policies of the federal statutes.[109]

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[104] See note 1 *supra.*

[105] Owen v. City of Independence, 445 U.S. at 638.

[106] Carey v. Piphus, 435 U.S. 247, 257-58 (1978). The Court addressed common law tort damages as a starting-point for inquiry into § 1983 damages. *Id.* at 257-58. *Piphus* involved two consolidated cases in which a customary 20-day suspension was enforced without a hearing, thereby denying petitioners' procedural due process rights. *Id.* at 249-50. The Court analogized tort interests to constitutional rights while simultaneously recognizing that some constitutional rights do not have analogous tort interests. *Id.* at 258.

[107] *Id.* at 258-59.

[108] *See id.* at 258 n.13 (§ 1988 authorizes courts to use common law of states where necessary to provide appropriate relief under § 1983); Baskin v. Parker, 588 F.2d 965, 970 (5th Cir. 1979) (damages for deprivation of a federally protected right are governed by federal standards under § 1988). 42 U.S.C. § 1988 (1976) provides:

> The jurisdiction in civil matters . . . shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all causes where they are not adapted to the object, or are defined in the provisions necessary to furnish suitable remedies and punish, . . . the common law, as modified and changed by the constitutions and statutes of the state . . . so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause. . . .

[109] Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969) (awarding compen-

At the very least, a plaintiff who has suffered a constitutional deprivation is entitled to nominal damages.[110] Furthermore, he is entitled to any compensatory damages he can prove.[111] Thus, the plaintiff can be compensated for his illegal arrest,[112] illegal search,[113] unlawful confinement,[114] or for any pain, suffering or humiliation caused by the unconstitutional misconduct.[115] If he has been forced to expend money to defend himself in a court proceeding initiated by the local governmental entity, then he is entitled to recover those costs as well.[116]

Although the Supreme Court has left the question open, most lower federal courts have awarded punitive damages against public officials in appropriate cases.[117] The lower courts

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satory damages under § 1983 for racial discrimination by a community recreation corporation that excluded a black resident from park facilities).

[110] *See* Carey v. Piphus, 435 U.S. 247, 248 (1978) (nominal damages may be awarded for deprivation of procedural due process without proof of actual injury). The common law traditionally awarded nominal damages for deprivation of certain absolute rights without proof of actual injury. *Id.* at 266. The Court in *Piphus* reasoned that the right of procedural due process does not depend on the merits of substantive claims and is vital to organized society. *Id.* Since procedural due process is an absolute right the Court ruled that recovery of nominal damages for denial of procedural due process does not require proof of actual injury. *Id.*

[111] *Id.* at 266. However, the Court held that it will not presume substantial damages where a plaintiff has been denied his right to procedural due process. *Id.* at 262-63.

[112] *See, e.g.,* Basista v. Weir, 340 F.2d 74, 85-87 (3d Cir. 1965) (nominal, compensatory, and punitive damages available under § 1983 for arrest without provocation or warrant in private home); Rhoads v. Horvat, 270 F. Supp. 307, 311 (D. Colo. 1967) (actual and punitive damages available for warrantless arrest). These cases also indicate that a successful plaintiff may be compensated for medical expenses or loss of earnings occasioned by the illegal arrest. 340 F.2d at 84-85. The *Rhoads* court concluded that out-of-pocket losses should be determined by the jury. 270 F. Supp. at 310.

[113] Baskin v. Parker, 588 F.2d 965, 967 (5th Cir. 1979) (compensatory damages for illegal and unreasonable search without probable cause); Sexton v. Gibbs, 327 F. Supp. 134, 142 (N.D. Tex. 1970) (illegal search; nominal, compensatory and exemplary damages recoverable), *aff'd,* 446 F.2d 904 (5th Cir. 1971), *cert. denied,* 404 U.S. 1062 (1972).

[114] Whirl v. Kern, 407 F.2d 781, 796-97 (5th Cir. 1968) (recovery for physical and mental injury as well as physical discomfort in jail during false imprisonment or unlawful detention), *cert. denied,* 396 U.S. 901 (1969).

[115] Carey v. Piphus, 435 U.S. 247, 264 (1978); Baskin v. Parker, 588 F.2d 965, 970 (5th Cir. 1979); Whirl v. Kern, 407 F.2d 781, 797 (5th Cir. 1968).

[116] Kerr v. City of Chicago, 424 F.2d 1134, 1141 (7th Cir. 1970) (in a § 1983 action for unlawful detention of a minor, funds expended by minor's parents for attorney's fees in criminal proceedings are recoverable).

[117] Carey v. Piphus, 435 U.S. 247, 257 n.11 (1978). For a list of lower court opinions awarding punitive damages against public officials, see C. ANTIEAU, FEDERAL CIVIL

currently are divided on the question of whether punitive damages may be recovered from a municipality.[118] It can be argued that a prevailing plaintiff is made whole by an award of compensatory damages,[119] and that the imposition of exemplary damages will operate to punish the taxpayers rather than the corporate entity itself.[120] In many cases, however, the amount of compensatory damages recoverable will be minimal. Therefore, if a major goal of section 1983 is to deter unconstitutional conduct, punitive damages should be available against a municipality guilty of flagrant misconduct in its official capacity. At a minimum, punitive damages should be available against a municipality if they would be available under state law.[121] In addition to monetary relief, an order to expunge all records of an illegal arrest or seizure may be proper.[122]

Federal courts also have power to enjoin enforcement of an unconstitutional statute or ordinance.[123] However, concerns of comity and federalism may warrant a declaratory remedy in such cases because the latter remedy is less intrusive into state affairs than an injunction.[124] In any event, prospective relief may

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RIGHTS STATUTES § 212 n.21 (2d ed. 1980).

[118] *Compare* Simineo v. School Dist. No. 16, 594 F.2d 1353, 1357 (10th Cir. 1979) (public school teacher recovered punitive damages against school board for termination without procedural due process) *and* Cook v. City of Miami, 464 F. Supp. 737, 739 (S.D. Fla. 1979) (denial of motion to strike plaintiff's demand for punitive damages in § 1983 case) *with* Edmonds v. Dillin, 485 F. Supp. 722, 725, 730 (N.D. Ohio 1980) (municipality not liable for punitive damages in a civil rights action).

[119] Edmonds v. Dillin, 485 F. Supp. 722, 730 (N.D. Ohio 1980).

[120] *Id.*

[121] *See* Sullivan v. Little Hunting Park, 396 U.S. 229, 239-40 (1969) (both federal and state rules on damages are available to serve policies expressed in federal statutes).

[122] Sullivan v. Murphy, 478 F.2d 938, 958 (D.C. Cir.) (order to expunge records appropriate to preserve basic legal rights), *cert. denied*, 414 U.S. 880 (1973); Wilson v. Webster, 467 F.2d 1282, 1283-84 (9th Cir. 1972) (plaintiffs entitled to hearing on expungement of records to show impairment of fundamental rights by continued existence of records).

[123] *See* Wooley v. Maynard, 430 U.S. 705, 711-12 (1977) (injunctive relief preventing enforcement of unconstitutional statute appropriate in exceptional circumstances); Doran v. Salem Inn, Inc., 422 U.S. 922, 931 (1975) (preliminary injunction may be granted to prevent enforcement of contested statute against plaintiff if enforcement would result in irreparable injury); Hague v. CIO, 307 U.S. 496, 518 (1939) (petitioners were entitled to injunction prohibiting enforcement of ordinance declared void).

[124] *See* Steffel v. Thompson, 415 U.S. 452, 460-73 (1974) (declaratory relief appropriate where injunctive relief not); Cicero v. Olgiati, 410 F. Supp. 1080, 1089-90

be made available whether the law is alleged to be unconstitutional on its face or merely as applied.[125]

Injunctive relief has also been granted to correct abuses of process such as warrantless searches of homes.[126] Similarly, in *Illinois Migrant Council v. Pilliod,*[127] the Court of Appeals for the Seventh Circuit affirmed the issuance of a preliminary injunction against agents and officials of the Immigration and Naturalization Service to prohibit them from detaining people solely on the basis of race and without probable cause to believe them to be aliens.[128]

The question of federal courts' power to issue injunctions to prevent police brutality was raised in *Rizzo v. Goode.*[129] The Supreme Court cautioned that equitable relief should not exceed the scope of the constitutional violation and that considerations of comity and federalism may limit the availability of broad mandatory injunctions against police departments.[130]

Rizzo, however, has not been interpreted to withdraw completely the power of federal courts to remedy police brutality by injunction. Thus, in *Lyons v. City of Los Angeles,*[131] the Court

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(S.D.N.Y. 1976) (judgment on validity of state administrative procedure permissible where no cases under the statute are pending).

[125] Steffel v. Thompson, 415 U.S. 452, 473-75 (1974). Once a prosecution is pending in state court, equitable considerations as well as considerations of comity and federalism will ordinarily prevent a federal court from interfering with the proceeding. *See, e.g.,* Hicks v. Miranda, 422 U.S. 332, 348-52 (1975) (district court erred in declaring statute unconstitutional while criminal prosecution was pending); Samuels v. Mackell, 401 U.S. 66, 73-74 (1971) (declaratory judgment improper when criminal prosecution pending); Younger v. Harris, 401 U.S. 37, 43-53 (1971) (injunctive relief by federal court improper while state criminal action in progress).

[126] Lankford v. Gelston, 364 F.2d 197, 201 (4th Cir. 1966). Police officers over a 19-day period had made more than 300 routine searches of homes without warrants or probable cause. *Id.* at 198. *See* Allee v. Medrano, 416 U.S. 802, 815 (1974) (if there is a persistent pattern of police misconduct injunctive relief is appropriate).

[127] 540 F.2d 1062 (7th Cir. 1976), *aff'd and modified,* 548 F.2d 715 (7th Cir. 1977). Plaintiffs produced evidence of repeated actions by I.N.S. officials in stopping members of the plaintiff class without legal cause and in conducting illegal searches of dwelling places and factories. The court held the evidence sufficient to prove a practice and policy of the I.N.S. 540 F.2d at 1065-66.

[128] 540 F.2d at 1072.

[129] 423 U.S. 362 (1976).

[130] *Id.* at 377-80.

[131] 615 F.2d 1243 (9th Cir.), *cert. denied,* 101 S. Ct. 333 (1980)(White, Powell, and Rehnquist, JJ., dissenting).

of Appeals for the Ninth Circuit held that a federal court could issue an injunction against the Los Angeles Police Department if the latter encouraged police officers to apply strangleholds to motorists stopped for minor traffic violations.[132] Unlike *Rizzo*[133] and *O'Shea v. Littleton,*[134] which sought massive structural relief, the Court of Appeals noted that Lyons merely sought to enjoin the use of an established police practice that violated the constitutional rights of himself and others.[135] The court concluded that such narrowly tailored relief would not involve the federal courts in supervising the day-to-day functioning of a police department.[136]

In addition to damages and equitable relief, section 1988 provides for attorney's fees to the prevailing party in a section 1983 action.[137] The amount of attorney's fees recoverable in individual cases may well equal or even exceed the value of any compensatory damages awarded to the plaintiff.[138] Therefore, the availability of attorney's fees should have a twofold effect: first, plaintiffs will have greater incentive to bring section 1983 suits and second, municipalities will have increased incentive to eliminate those conditions which may give rise to municipality liability.

VII. CONCLUSION

The availability of remedies against a municipality in police misconduct cases should result in increased protection for innocent victims. Once an official policy is established by the evidence, responsibility can be placed upon a single entity.

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[132] 615 F.2d at 1246-50.

[133] 423 U.S. at 365.

[134] 414 U.S. 488, 500, *vacated and remanded in part sub nom.* Spomer v. Littleton, 414 U.S. 514 (1974). The Supreme Court in *O'Shea* noted that the injunction requested would result in an "ongoing federal audit of state criminal proceedings. . . ." *Id.* at 500.

[135] 615 F.2d at 1247.

[136] *Id.*

[137] 42 U.S.C. § 1988 (1976). *See* Maine v. Thiboutot, 100 S. Ct. 2502, 2506-07 (1980) (attorney's fees recoverable in § 1983 action for statutory violation of federal law whether suit in federal or state court).

[138] *See* Donaldson v. O'Connor, 454 F. Supp. 311, 315 (N.D. Fla. 1978) (settlement does not limit award of attorney's fees under § 1988). *See generally* Comment, *Calculation of a Reasonable Award of Attorney's Fees Under the Attorney's Fees Awards Act of 1976,* 13 J. MAR. L. REV. 331 (1980) (examination of factors used by courts to calculate attorney's fees awarded under § 1988).

In addition, naming a municipality as a defendant may well be wise strategy. Previously, if a police officer was sued for misconduct, the city automatically rushed to his defense claiming he acted in good faith and the plaintiff's injury, if any, was the result of systemic failures for which no one was legally answerable. As a result of *Monell* and *Owen*, the officer and the city may actually become enemies. The officer will argue that his actions were reasonable and done in good faith. The city will deny that a policy authorizing or condoning police misconduct exists. All of these factors should motivate municipalities both to eliminate conditions which foster police misconduct and to deal swiftly and efficiently with those officers who violate the rules. This appears to be precisely the result the Supreme Court in *Owen* sought to achieve.

***Editor's note:** As we go to press, it is essential to note that in City of Newport the Fact Concerts, Inc., 49 U.S.L.W. 4860 (June 23, 1981), the United States Supreme Court held municipalities are immune from punitive damages under 1983.

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COMMENTS

DIAMOND IN THE ROUGH: LOCAL LIABILITY FOR UNCONSTITUTIONAL CONDITIONS IN COUNTY JAILS—AN ANALYSIS OF JONES V. DIAMOND

I. INTRODUCTION

A. *Federal Intervention in State Prisons*—Gates v. Collier

In 1971 Nazareth Gates[1] filed a class action[2] in the Federal District Court for the Northern District of Mississippi attacking the unconstitutional conditions and practices at the legendary "Parchman Farm."[3] The result of this suit was the declaration by United States District Court Judge William C. Keady that

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[1] Nazareth Gates was a young black male prisoner at Parchman at the time the suit was filed. In view of his age, sex and race, Mr. Gates was representative of the typical Mississippi prisoner. Gates v. Collier, 349 F. Supp. 881, 886 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974) (of the 1900 inmates in Parchman in 1972, 50 were women and two-thirds of the total prison population was black); Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 3, col. 1 (typical Mississippi prisoner is a black male in his twenties).

[2] The suit was filed on behalf of two overlapping classes of plaintiffs. One class consisted of all inmates claiming deprivation of a broad range of rights. The second class consisted of all black inmates claiming racial discrimination and segregation in addition to the allegations asserted by the first class. 349 F. Supp. at 885 n.1 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974). Nazareth Gates was frequently the representative of classes of inmates seeking relief from the conditions of the Mississippi State Penitentiary at Parchman. *See* Gates v. Collier, 559 F.2d 241 (5th Cir. 1977) (determination of award of attorneys fees); Gates v. Collier, 548 F.2d 1241 (5th Cir. 1977) (temporary restraining order closing camps and ensuring minimum living space for prisoners upheld); Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974) (practices and conditions at Parchman held to be unconstitutional); Gates v. Collier, 407 F. Supp. 1117 (N.D. Miss. 1975) (motion to accelerate compliance with timetable was denied); Gates v. Collier, 390 F. Supp. 482 (N.D. Miss. 1975) (submission of comprehensive plan for compliance with guidelines required).

[3] Gates v. Collier, 349 F. Supp. 881, 881-82 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974). The named defendants were penitentiary superintendent Thomas D. Cook, the members of the Mississippi Penitentiary Board and Mississippi Governor William L. Waller. John Collier replaced Thomas D. Cook as superintendent in February 1972, and was substituted as a defendant. 349 F. Supp. at 885.

Parchman was "unfit for human habitation,"[4] signaling the beginning of federal intervention in the traditionally local matter of state prison administration.[5] Over the next nine years, Judge

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[4] 349 F. Supp. at 894.

[5] Traditionally, a federal court would not inquire into the internal operations of state penitentiaries in the absence of exceptional circumstances. Sinclair v. Henderson, 435 F.2d 125, 126 (5th Cir. 1970) (federal courts are reluctant to interfere with the internal operations of prisons but will entertain allegations of extreme mistreatment of prisoners). *See* Haines v. Kerner, 404 U.S. 519, 520 (1972) (pro se complaint held to withstand a Rule 12(b)(6) challenge regardless of any limitations upon the scope of inquiry into the internal administration of prisons). Judge Kaufman, writing for the majority in Sostre v. McGinnis, 442 F.2d 178 (2d Cir. 1971)(en banc), *cert. denied,* 405 U.S. 978 (1972), embraced the traditional view when he stated:

> We do not doubt the magnitude of the task ahead before our correctional systems become acceptable and effective from a correctional, social and humane viewpoint, but the proper tools for the job do not lie with a remote federal court. The sensitivity to local nuance, opportunity for daily perseverance, and the human and monetary resources required lie rather with legislators, executives, and citizens in their communities.

442 F.2d at 205 (officials enjoined from imposing solitary confinement because of prisoner's political beliefs and involvement in lawful activities). *See generally* Remington, *State Prisoner Litigation and the Federal Courts,* 1974 ARIZ. ST. L.J. 549, 549 (federal courts followed a "hands-off" doctrine by refusing to become involved in state correctional practices, "leaving decision making to those most knowledgeable about the needs of the correctional system"); Comment, *Cruel But Not So Unusual Punishment: The Role of the Federal Judiciary in State Prison Reform,* 7 CUM. L. REV. 31, 32 (1976) (federal courts' "hands-off" philosophy concerning the rights of prisoners was based in part upon the view that each state should control the internal management of its prisons).

The initial *Gates* suit was the first case in the Fifth Circuit in which a federal court intervened on a broad scale in the internal affairs of a state prison. Judge Tuttle had indicated in an earlier dissenting opinion that federal courts should intervene substantially in the unconstitutional practices of state prisons. Novak v. Beto, 453 F.2d 661, 672 (5th Cir. 1971) (Tuttle, J., concurring in part and dissenting in part) (federal review of state prison confinement practices under the eighth amendment's test of "cruel and unusual punishment" cannot rely upon corrective action to be taken by the state legislative and administrative branches), *cert. denied,* 409 U.S. 968 (1972). *See also* Hutchens v. Alabama, 466 F.2d 507, 508 (5th Cir. 1972) (per curiam) (complaint by prisoner alleging lack of medical attention stated a claim for relief); Campbell v. Beto, 460 F.2d 765, 768 (5th Cir. 1972) ("courts cannot close their judicial eyes to prison conditions which present a grave and immediate threat to health or physical well being"); Rocha v. Sowers, 454 F.2d 1155, 1156 (5th Cir. 1972) (per curiam) (complaint by prisoner alleging denial of adequate medical treatment stated a claim under the civil rights acts).

The United States Supreme Court addressed the issue of federal court intervention in state prison affairs in the same year the initial *Gates* suit was decided by the district court. *See* Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' which include prisoners").

Keady issued a series of mandates setting minimum constitutional standards. Among other things, the court ordered that each state prisoner be allotted a minimum of fifty square feet of living space,[6] thus reducing the available living space by closing unconstitutional housing units.[7] In 1975 Judge Keady closed Parchman to incoming inmates until the state could provide adequate space for the existing prison population.[8] The burden of housing state prisoners was thus shifted to Mississippi's county jails.[9]

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[6] Gates v. Collier, 407 F. Supp. 1117, 1123 (N.D. Miss. 1975).

[7] In the 1972 opinion of Gates v. Collier, 349 F. Supp. 881, 887-88 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974), the district court found many of the housing units at Parchman to be deplorable. In 1975, the court ordered that six camps be closed. Gates v. Collier, 407 F. Supp. 1117, 1122 (N.D. Miss. 1975). On February 3, 1975, the defendants were ordered to establish a timetable for the elimination of those camps found unfit for human habitation. Gates v. Collier, 423 F. Supp. 732, 739-40 (N.D. Miss. 1976), *aff'd,* 548 F.2d 1241 (5th Cir. 1977). After consideration of the defendants' plan and in light of the court's finding that unconstitutional conditions still existed at Parchman, the court established the following schedule for the elimination of those camps determined to be unfit for human habitation: two camps were to be closed by July 7, 1976; two camps were to be closed by January 1, 1977; and two more camps were ordered closed by July 1, 1977. 423 F. Supp. at 738-39.

[8] Gates v. Collier, 407 F. Supp. 1117, 1123 (N.D. Miss. 1975). The defendants claimed that they were unable to comply with the court's order closing Parchman to new inmates because of the enactment of the Mississippi Corrections Act of 1976 § 12(a), *codified at* Miss. Code Ann. § 47-5-10(a) (Supp. 1979) (to be repealed effective July 1, 1981). Gates v. Collier, 423 F. Supp. 732, 743 (N.D. Miss. 1976), *aff'd,* 548 F.2d 1241 (5th Cir. 1977). That section of the Act made it the duty of the Department of Corrections "[t]o accept adult offenders committed to it by the courts of this state for incarceration, care, custody, treatment and rehabilitation." Miss. Code Ann. § 47-5-10(a) (Supp. 1979). Two other state law provisions presented potential impediments to the defendant's compliance with the court's depopulation order. One statute prevented an inmate from being sent to a county pursuant to the state's work release program over the objection of that county's sheriff, circuit judge, or district attorney. 423 F. Supp. at 743 (citing Miss. Code Ann. § 47-5-165 (Supp. 1979) (to be repealed effective July 1, 1981)). The second statute prohibited the placing of any state offender in a county jail without the prior consent of the local jail authority and the Department of Corrections' certification to the lack of space. 423 F. Supp. at 743-44 (citing Miss. Code Ann. § 47-5-159 (Supp. 1979) (to be repealed effective July 1, 1981)). The court issued a temporary restraining order enjoining enforcement of the state law on the basis of its finding of constitutionally impermissible conditions at Parchman. 423 F. Supp. at 744.

[9] In order to comply with the court order requiring 50 square feet per inmate, the defendants were faced with two alternatives: (1) the expansion of housing facilities, or (2) the reduction of inmate population. Efforts to reduce prisoner population through work release and early release programs proved futile. Gates v. Collier, 423 F. Supp. 732, 736 (N.D. Miss. 1976), *aff'd,* 548 F.2d 1241 (5th Cir. 1977).

Today, most state prisoners at Parchman enjoy clean, well-lighted dormitories, well-balanced meals, a variety of recreational and educational programs,[10] reasonable access to a law library and inmate writ-writers,[11] and an adequate medical staff,[12]

In attempting to rectify the unconstitutional conditions at Parchman, the legislature adopted a proposal that specified long range and immediate objectives for improving the state penitentiary. *See* 1973 Miss. Laws ch. 440, § 20, *as amended by* 1974 Miss. Laws ch. 528, § 1 (codified at MISS. CODE ANN. § 47-5-5 (Supp. 1979)). The cost estimates of Phase I projects designed to provide more modern and efficient penal facilities were as follows:

(1)	Training Facilities	$45,000.00
(2)	Classification and Filing	$55,000.00
(3)	Camp Renovation	$250,000.00
(4)	Security Building	$125,000.00
(5)	Construction of a first offenders camp	$700,000.00
(6)	Complete renovation and additional construction to penitentiary hospital at present location	$500,000.00
(7)	Central food and service facility to be constructed in connection with central complex	$350,000.00
(8)	Security Fencing	$100,000.00
(9)	One (1) maximum security unit	$875,000.00
	Total Expenditure for Implementation of Phase I	$3,000,000.00

MISS. CODE ANN. § 47-5-5 (Supp. 1979).

[10] *See, e.g.,* Gates v. Collier, 390 F. Supp. 482, 485 (N.D. Miss. 1975) (court noted the improved conditions at Parchman), *aff'd,* 525 F.2d 965 (5th Cir. 1976).

[11] Pursuant to a consent order entered by the court, a comprehensive library of criminal law materials, including federal and Mississippi cases, digests, encyclopedias, textbooks and treatises featuring criminal jurisprudence was established at Parchman. Stevenson v. Reed, 391 F. Supp. 1375, 1377 n.2 (N.D. Miss. 1975), *aff'd,* 530 F.2d 1207 (5th Cir.), *cert. denied,* 429 U.S. 944 (1976).

[12] Gates v. Collier, 407 F. Supp. 1117, 1118, 1121 (N.D. Miss. 1975). In July 1980, the medical staff at Parchman moved into the new $4 million medical/dental facility, which houses 56 beds, including 14 psychiatric beds, 18 female medical beds, and 24 male medical beds. The medical facility at Parchman provides the following services: on-site basic general practice and psychiatric medical care by staff (full-time) and basic dental care by staff (full-time); on-site contractual specialists (part-time) including ophthalmologists, optometrists, and radiologists; minor surgery by staff; consulting specialists available at the University Medical Center in all fields. Also, the plan is to include additional consulting specialists on a part-time contractual basis as they become available in the geographical area. The complex is staffed with four full-time doctors including one psychiatrist, two dentists, one full-time registered pharmacist, one part-time registered pharmacist, nine licensed practical nurses, seven registered nurses, including an emergency room nurse/supervisor and a psychiatric nurse, six licensed emergency medical technicians, one certified laboratory technologist, and one certified X-ray technologist. Finally, one of the doctors is licensed to practice in Mississippi, two doctors institutionally licensed, and the psychiatrist is institutionally licensed to practice. Letter from

all administered by the Mississippi Department of Corrections.[13] As of December 1979, however, there were 998 state prisoners housed in county jails waiting for space to become available at Parchman.[14] Paradoxically, while these inmates wait in county jails to ensure the constitutionally minimum standards required by *Gates v. Collier,* the conditions in county jails are frequently worse than those for which the *Gates* decision provided a remedy.[15] For example, only 6.5 percent of Mississippi's local jails have recreational programs;[16] visitation rights are arbitrarily withheld as punishment;[17] and meals may be inadequate and unpalatable.[18] Other allegations from county prisoners of unconsti-

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Rebecca L. Jones, MSW Hospital Administrator (June 18, 1980) (on file with the *Mississippi Law Journal*).

[13] The Mississippi Department of Corrections is under the policy direction of the Mississippi Board of Corrections. MISS. CODE ANN. § 47-5-8(1) (Supp. 1979) (to be repealed effective July 1, 1981). *Id.* § 47-5-10 (Supp. 1979) enumerates the powers and duties of the Department of Corrections. The Board of Corrections is composed of seven members appointed by the Governor. At least one attorney and one physician must be appointed to the board. *Id.* § 47-5-12 (Supp. 1979) (to be repealed effective July 1, 1981).

[14] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2. State Department of Corrections' records reveal that during the past 21 months there have been as many as 1,175 and as few as 715 state prisoners housed in county jails. The average for this period was 922. *Id.*

[15] *See* Taft, *Backed Up In Jail: County Lockups Overflow as Courts Clamp Down on State Prisons,* CORRECTIONS, June, 1979, at 27 ("prisoners sentenced to long terms are spending months and even years in local jails that are barely fit to spend the night in, because there is no room in long-term institutions"). Corrections Commissioner Watkins has indicated that the backlog of state inmates in county jails awaiting transfer to Parchman will continue to exist until at least 1982, when newer facilities are scheduled to be completed at the penitentiary. Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, D-3, col. 1.

[16] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2; *cf.* Gates v. Collier, 390 F. Supp. 482, 485 (N.D. Miss. 1975) (inmates at Parchman are provided with "an adequate recreation program"), *aff'd,* 525 F.2d 965 (5th Cir. 1976).

[17] *See* Valentine v. Englehardt, 474 F. Supp. 294, 295 (D.N.J. 1979) (county jail regulations barring visitation of inmates by their children are unconstitutional); Mitchell v. Untreiner, 421 F. Supp. 886, 891 (N.D. Fla. 1976) (severely restrictive visitation procedures subject to the determination of jail personnel without written guidelines was a factor in determination of county jail's practices as violative of prisoners' constitutional rights). By contrast, the policies of the state prison facility at Parchman not only allow children to visit incarcerated parents every other week, but also permit conjugal visitation by the inmates' spouses. Gettinger, *Mississippi Has Come a Long Way, But it had a Long Way to Come,* CORRECTIONS, June, 1979, at 18.

[18] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at D-2, col. 2. A daily allowance of 2,700 calories is recommended for the average male between 23 and 50. A mature

tutional treatment range from head-shaving[19] to denial of medical treatment resulting in death.[20] Furthermore, presumptively innocent people awaiting trial are frequently crowded with convicted felons awaiting transfer to Parchman.[21]

B. Recommended County Standards

To date, over thirty county jails in Mississippi are the sub-

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man who sits or stands for 12 hours and lies down for 12 hours a day consumes at least 2000 calories per day. NATIONAL ACADEMY OF SCIENCES, RECOMMENDED DIETARY ALLOWANCES app., at 27 (8th rev. ed. 1974).

Although the state requires that prisoners in county jails be fed, there are no regulations as to the quality of the food or the number of calories. MISS. CODE ANN. § 47-1-47 (Supp. 1979) ("every convict shall be sufficiently fed, to maintain his body and induce his good health, with substantial and suitable food . . . ."). A $5.00 per day total expenditure is statutorily allocated for "food and related supplies" for each county prisoner. *Id.* § 19-23-73 (Supp. 1979). All contracts for the purchase of materials, supplies, equipment, and sustenance of offenders of the correctional system must be made under the provisions of the state purchasing law. *Id.* §§ 31-7-1 to -129 (1972 & Supp. 1979).

[19] Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976) (Madison County jailer who shaved the head of an inmate to be released the next day held liable under § 1983). *But cf.* Williams v. Hoyt, 556 F.2d 1336, 1338-39 (5th Cir. 1977) (head-shaving by county jail officials for sanitary reasons after determining prisoner had "filthy and insect-infested" hair held not violative of § 1983), *cert. denied,* 435 U.S. 946 (1978).

[20] Farmer v. State, 224 Miss. 96, 106, 79 So. 2d 528, 531 (1955) (sheriff held liable for death of man in his custody due to lack of medical attention and proper diet). By statute, a sheriff owes a duty of reasonable care to his prisoners to call a physician or a surgeon if he thinks that the prisoner is in need of medical attention. If the inmate is unable to assume the cost of his medical treatment, the county is empowered to pay the physician up to $5.00 for each visit. MISS. CODE ANN. § 47-1-57 (1972). *See* Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971) ("sheriff cannot escape his responsibility to take reasonable care of prisoners in his custody by simply making a casual examination of one who obviously needs medical attention, then declaring . . . that he did not need such aid"); MISS. CODE ANN. § 47-1-59 (1972) (sheriff is authorized to take a prisoner requiring medical attention to the nearest hospital in the county for treatment by a physician).

[21] *See* Bell v. Wolfish, 441 U.S. 520, 524 (1979) (pretrial detainees and convicted inmates were housed in the federal Metropolitan Correction Center in New York City); Jones v. Diamond, 594 F.2d 997, 1006 (5th Cir.) (57 of the 74 prisoners confined at the Jackson County Jail on June 20, 1977, would have been confined at Parchman except for the unconstitutional conditions of the penitentiary), *rehearing granted,* 602 F.2d 1243 (5th Cir. 1979) (en banc); Carter v. Noble, 526 F.2d 677, 678 (5th Cir. 1976) (per curiam) (traffic offender retained in Madison County, Mississippi, jail for nonpayment of fees incurred that day); Cole v. Tuttle, 366 F. Supp. 1252, 1253 (N.D. Miss. 1973) (defendant in state criminal proceeding incarcerated in Panola County Jail prior to trial on the merits because of his inability to make bond).

ject of litigation concerning their operations and regulations.[22] In January of 1980 the Center for Governmental Technology at Mississippi State University developed an extensive checklist to assist local and county officials in determining their vulnerability to potential lawsuits.[23] The manual encourages officials to: (1) have regular inspections by the fire and health departments to ensure compliance with various safety regulations; (2) dispose of all flammable mattresses, pillows and upholstery padding; (3) segregate by sex, age and seriousness of the crime; (4) separate pretrial detainees from convicted felons; (5) have adequate garbage disposal systems; and (6) inspect regularly for rodents and pests.[24] The handbook also suggests that menus be approved by a dietitian and that special diets be provided for medical or religious reasons.[25] To reduce unsanitary living conditions, jail officials are directed to: (1) supply basic hygenic items; (2) issue clean clothes daily or offer inmates an opportunity to launder their own; (3) provide clean towels three times a week and access to bath facilities daily; and (4) sanitize mattresses frequently.[26] The manual places special emphasis upon adequate medical care and attention.[27] Jail officials should have written agreements with physicians and hospitals for constant availability of medical treatment.[28] Moreover, every inmate should be given a physical examination shortly after admission.[29] The manual also includes detailed disciplinary rules and procedures in addition to model mail regulations, law library access procedures[30] and a suggested classification system.[31] Although compliance with this checklist cannot guarantee immunity from suit, these measures should be implemented voluntarily in recognition of the rights retained by prisoners.

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[22] Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 24, col. 2.

[23] CENTER FOR GOVERNMENTAL TECHNOLOGY: MISSISSIPPI STATE UNIVERSITY COOPERATIVE EXTENSION SERVICE, PUB. AD. SER., NO. 9, JAIL OPERATIONS: A GUIDE FOR COUNTY AND MUNICIPAL GOVERNMENTS 2 (1980) [hereinafter cited as JAIL OPERATIONS]. The suggested preventive measures reflect federal and state court decisions. *Id.*

[24] *Id.* at 3; *see* MISS. CODE ANN. § 19-25-71 (1972) (sheriff is to separate prisoners by sex in county jails).

[25] JAIL OPERATIONS, *supra* note 23, at 4.

[26] *Id.*

[27] *Id.* at 4, 15.

[28] *Id.* at 4; *see* MISS. CODE ANN. § 47-1-57 (1972) (county officials may enter into yearly contracts with a physician to provide medical services for inmates).

[29] JAIL OPERATIONS, *supra* note 23, at 4. In addition to providing physical examinations of inmates, information should be obtained from each prisoner to facilitate emergency care. Daily sick-call should be conducted and requests by inmates for medical attention should never be ignored. *Id.* at 4, 15.

C. *Federal Intervention in Local Jails*—Jones v. Diamond

Traditionally, county jails have been considered a purely local matter. State law prescribes only general guidelines, investing local officials with vast discretion in day-to-day administration.[32] Courts have been reluctant to intervene in jail administration[33]—the same approach taken with state prisons—until recently.[34] Despite the courts' "hands off" attitude, both prisoners[35] and prison officials[36] advocate applying the *Gates* standards to county jails.

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[30] *Id.* at 18-26.

[31] *Id.* at 5.

[32] *See* MISS. CODE ANN. § 19-25-69 (1972) (sheriff is empowered to maintain the county jail "in a clean and comfortable condition"); *id.* § 19-25-71 (sheriff shall provide all prisoners with "daily wholesome and sufficient food and drink, fire and lights when necessary and proper, and sufficient and clean bedding . . ."); *cf. id.* § 47-1-51 (jailer of facility jointly owned by a county and a municipality also required to provide for prisoners). For an analysis of the sheriff's duty to provide medical treatment for inmates, see note 20 *supra.*

[33] *See, e.g.,* Dailey v. Byrnes, 605 F.2d 858, 862 (5th Cir. 1979) (inmates challenging conditions of confinement at a county jail in Alabama were denied relief); McMahon v. Beard, 583 F.2d 172, 173-74 (5th Cir. 1978) (pretrial detainee was denied relief after being confined to "strip cell" and denied medical attention following a suicide attempt); Cole v. Tuttle, 366 F. Supp. 1252, 1253-55 (N.D. Miss. 1973) (county inmates denied relief from unsanitary and unsafe conditions in Panola County Jail); *cf.* Jones v. Diamond, 594 F.2d 997, 1029-30 (5th Cir.) (inmates suing Jackson County Jail for unconstitutional conditions of confinement denied damage claim but granted injunctive relief), *rehearing granted,* 602 F.2d 1243 (5th Cir. 1979) (en banc); Patterson v. Hopkins, 481 F.2d 640, 640 (5th Cir. 1973) (per curiam) (juveniles in Coahoma County Jail granted declaratory relief from conditions but denied request for damages). *But see* Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971) (sheriff cannot avoid responsibility of taking reasonable care of prisoners in his custody by casually examining one obviously in need of medical attention); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 669 (S.D. Tex. 1975) (sweeping reform of jail conditions in Texas granted); Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528, 529-31 (1955) (sheriff liable for abuse of discretion resulting in death of inmate).

[34] *See* note 5 *supra.*

[35] *See* Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at 3, col. 2 (two state prisoners confined in jail in Adams County, Mississippi, attempted suicide by hanging in protest of intolerable conditions).

[36] *See id.*

In 1973 Marvin Jones filed a class action in the Federal District Court for the Southern District of Mississippi on behalf of all past, present, and future inmates incarcerated at the Jackson County Jail in Pascagoula, Mississippi.[37] The complaint, pursuant to section 1983,[38] sought injunctive relief for comprehensive reform of conditions, programs and practices existing at the "old" jail, and sought damages for constitutional violations occurring when the plaintiff and his class were detained there.[39] The named defendants were the sheriff, his agents and employees, trusties serving at the jail since January, 1972, and the Jackson County Board of Supervisors.[40] The prisoners alleged that the defendants had failed to provide recreational programs, adequate living space, medical care, reasonable visitation privileges, integrated accommodations, clearly cognizable rules, and separation of convicted persons from pretrial detainees.[41]

Responding to Jones' requests, District Judge Harold Cox entered an order denying the request for class action certification and dismissed the board of supervisors as defendants.[42] Jones appealed the order and the Fifth Circuit reversed and remanded.[43] Following the trial on the merits, Judge Cox rendered an opinion denying injunctive and monetary relief to the named plaintiff without making a decision as to the class.[44] Instead of appealing the judgment, Jones requested the Fifth Circuit to issue a writ of mandamus compelling Judge Cox to consider the class issue. After the court issued the writ, Judge Cox responded by denying most of the relief the class had requested.[45] Both the named plaintiff and the class then filed motions for leave to appeal in forma pauperis.[46] The class was granted leave to appeal in forma pauperis but Jones' motion was denied.[47]

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[37] Jones v. Diamond, 519 F.2d 1090, 1093-94 (5th Cir. 1975). The class consisted of at least 8,580 persons. Jones v. Diamond, 594 F.2d 997, 1009 (5th Cir.), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979) (en banc).

[38] 42 U.S.C. § 1983 (Supp. III 1979). For the text of § 1983, see note 167 *infra*.

[39] 519 F.2d at 1093.

[40] *Id.* at 1094.

[41] *Id.* at 1093 n.2.

[42] *Id.* at 1097, 1100. Apparently, Judge Cox's reasons for refusing to certify the class were: (1) Jones pled conclusions rather than the facts supporting the proposition; (2) failure to meet the jurisdictional amount; (3) mootness; and (4) failure to meet the numerosity requirement of FED. R. CIV. P. 23(a)(1).

[43] 519 F.2d at 1102. Overturning Judge Cox's order, the Fifth Circuit held that: (1) a trial court cannot deny certification of a class solely on the basis of initial pleadings; (2) 28 U.S.C. §§ 1331, 1343(a)(3) (Supp. III 1979) do not require a jurisdictional amount; (3) this is a situation "capable of repetition, yet evading review;" and (4) the numerosity requirement in civil rights cases is to be considered liberally, especially where the plaintiff is seeking injunctive relief for future class members. 519 F.2d at 1097-1100. As to the dismissal of the board of supervisors, the court concluded that the trial court could not dismiss the defendants before a hearing was held to determine whether or not they had acted in good faith. After Owen v. City of Independence, 445 U.S. 622 (1980), political

On appeal, Fifth Circuit Judges Coleman and Clark concluded that Jones was barred from appealing his individual claims since he had not filed a timely appeal regarding the denial of his individual claims. However, the court held that Jones was still an adequate representative of the class.[48] Furthermore, the court affirmed the denial of damages, concluding that there was no proof of deliberate or callous indifference on the defendants' part.[49] The court also affirmed the district court's denial of the class' request for sweeping injunctive relief, finding that the jail conditions were not unfit for human habitation.[50] On the other hand, the court reversed the district court's other findings and remanded the case for an order prohibiting segregation, prescribing rules regulating the number of inmates to be housed, classifying prisoners, and detailing jail officials' duties.[51]

At oral argument the appellants urged the panel to recon-

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subdivisions can no longer assert as a defense the good faith of their officials. *See* notes 189 through 194 and accompanying text *infra.*

[44] Jones v. Diamond, 594 F.2d 997, 1004-05 (5th Cir.), *rehearing granted,* 602 F.2d 1243 (5th Cir. 1979) (en banc).

[45] 594 F.2d at 1005.

[46] *Id.; see* FED. R. APP. P. 24.

[47] 594 F.2d at 1005.

[48] *Id.* at 1022. The court noted that the district court's order adjudicating Jones' individual rights was final and appealable. Since Jones did not take a timely appeal from this order, he was barred from appealing his individual claims. *Id.* at 1005 n.2. Although Jones' individual claims had been dismissed, the court held that he could adequately represent the class since he was still a member of the class and retained the same interests of the class. *Id.* at 1005; *see* Sosna v. Iowa, 419 U.S. 393, 403 n.13 (1975) (named plaintiff can continue to represent a class if he or she retains the interests of the class).

[49] 594 F.2d at 1022.

[50] *Id.* at 1017-18.

[51] *Id.* at 1011-20.

sider the case in light of the recent Supreme Court decision in *Bell v. Wolfish*,[52] where the Court stated that the constitutionality of conditions or restrictions imposed upon pretrial detainees should be analyzed under the fourteenth amendment rather than the eighth amendment. According to the Court, the proper inquiry should be whether the pretrial detainee has been *punished* without due process of the law.[53] Although the panel recognized that the due process clause, rather than the eighth amendment, was applicable to pretrial detainees,[54] the court appears to have applied the cruel and unusual punishment standard throughout.[55] Thus, the panel essentially substituted a general constitutional standard for an issue otherwise resolved by the weight of proof: whether prison officials acted with deliberate and callous indifference. Indeed, as Judge Rubin pointed out in his concurring and dissenting opinion, the majority "failed to distinguish between the *nature of the conduct* that must be shown to establish a violation of constitutional rights and whether, if such a violation is shown, the *degree of culpability* justifies the imposition of damages under section 1983."[56]

Jones has been reheard en banc by the Fifth Circuit and a decision is now pending. The case gained circuit-wide attention because a majority of one panel of this large circuit utilized a case dealing with one county jail in Mississippi to write an extensive opinion delineating general standards that could be used as a guide throughout the circuit. Thus, *Jones* is the potential vehicle for applying federal standards to county jails.[57]

When local authorities and voters refuse to upgrade jail conditions voluntarily,[58] the courts have a duty to protect and enforce prisoners' constitutional rights.[59] Nevertheless, bridging the gap between fulfillment of this obligation and a comprehensive judicial reform of county jails is not without serious problems.

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[52] 441 U.S. 520 (1979).

[53] *Id.* at 535 (emphasis added). For a discussion of what the Court considers punishment, see notes 293 through 296 and accompanying text *infra*.

[54] 594 F.2d at 1003.

[55] *See id.* at 1019.

[56] *Id.* at 1035 (emphasis added).

[57] United States Fifth Circuit Judge J.P. Coleman authored the majority opinion which granted the plaintiffs injunctive relief only against future overcrowding of the Jackson County, Mississippi, Jail. *Id.* at 1003, 1022. Judge Alvin Rubin wrote a strong dissent to the court's decision. *Id.* at 1031-39.

[58] In 1979, Harrison and Oktibbeha counties rejected proposals for bond issues appropriating funds for new jails. Clarion-Ledger Jackson Daily News, Dec. 31, 1979, at

II. ATTORNEY-CLIENT ACCESS

In the continuing effort to delineate the constitutional rights of prisoners, one of the areas closely scrutinized by the courts has been that of attorney-client access. Court decisions reflect "especial vigilance" in efforts to protect inmates' access to the courts.[60] In 1972, Judge Keady in *Gates*[61] stated that any prison-imposed restrictions on attorney-client access must be both reasonably and necessarily required for the advancement of some justifiable purpose related to incarceration.[62] Yet, prison officials do not have to "adopt every proposal that may be thought to facilitate prisoner access to the courts."[63] Reasonable

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2, col. 3.

[59] Cruz v. Beto, 405 U.S. 319, 321 (1972) (per curiam) ("Federal courts sit not to supervise prisons but to enforce the constitutional rights of all 'persons' including prisoners.").

[60] *See, e.g.*, Bounds v. Smith, 430 U.S. 817, 828 (1977) (prison authorities required to provide inmates with adequate law libraries or legal assistance); Johnson v. Avery, 393 U.S. 483, 490 (1969) (prison regulation barring inmates from assisting fellow inmates invalidated); Roberts v. La Valle, 389 U.S. 40, 42 (1967) (indigent pretrial inmates have a right to transcript of preliminary hearing at state expense; financial inability does not preclude access to the courts); Douglas v. California, 372 U.S. 353, 356-58 (1963) (counsel must be appointed to inmate for first appeal from conviction); Smith v. Bennett, 365 U.S. 708, 713 (1961) (state regulation requiring indigent inmates to pay filing fee for habeas corpus petitions and trial transcripts invalidated); Burns v. Ohio, 360 U.S. 252, 258 (1959) (convicted indigent prisoner not required to pay docket fee prior to filing notice of appeal of petition for habeas corpus); Griffin v. Illinois, 351 U.S. 12, 20 (1956) (state required to provide trial records to indigent inmates); *Ex parte* Hall, 312 U.S. 546, 549 (1941) (right of convicted offender to access to courts guaranteed by the fourteenth amendment); Gilmore v. Lynch, 319 F. Supp. 105, 112 (N.D. Cal. 1970) (three-judge court) (state officials must furnish inmates with reasonable law library), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 14 (1971) (per curiam).

[61] 349 F. Supp. 881 (N.D. Miss. 1972), *aff'd,* 501 F.2d 1291 (5th Cir. 1974).

[62] 349 F. Supp. at 896.

[63] Procunier v. Martinez, 416 U.S. 396, 420 (1974) (state regulation barring law students and paraprofessionals from inmates invalidated); *see* Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials may restrict attorney-client contacts by reasonable administrative rules); Davis v. United States, 455 F.2d 919, 920 (5th Cir. 1972) (access to courts not infringed when attorney's assistant denied interview with inmate), *aff'd,* 411

restrictions have been held to include the discretionary banning of disruptive attorneys,[64] confiscation of legal papers,[65] limitations on free postage,[66] forty-eight hour detention of mail addressed to attorneys,[67] and opening of incoming mail from attorneys.[68] Prison officials also have the power to regulate the "time, place and manner" in which prisoners in punitive isolation may communicate with attorneys and courts. To justify more rigorous limitations on access to the courts, the prison authorities must demonstrate a compelling need based on penitentiary discipline and administration.[69] The courts have considered each case individually, balancing the prisoners' fourteenth amendment right of access to the courts with the prison's interest in security.[70]

U.S. 233 (1973).

[64] Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials may exercise discretion in barring disruptive attorneys); *see* Elie v. Henderson, 340 F. Supp. 958, 967-68 (E.D. La. 1972) (attorney properly denied opportunity to visit prisoners who "were not and never had been his clients" and who had not requested counsel).

[65] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978) (48 hour detention of mail to verify attorney's identity upheld); Tyler v. "Ron" Deputy Sheriff or Jailer/Custodian of Prisoners, 574 F.2d 427, 429 (8th Cir. 1978) (per curiam) (jailer's taking of inmate's legal papers for a few hours did not interfere with right of access to courts).

[66] *See, e.g.*, Guajardo v. Estelle, 580 F.2d 748, 756 (5th Cir. 1978) (prison officials may control bulk mailings); Coleman v. Crisp, 444 F. Supp. 31, 32 (W.D. Okla. 1977) (prisoner's letters to judge returned because prisoner exceeded his quota of free postage; prisoner does not have a right to unlimited free postage).

[67] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978) (prison officials may retain an inmate's outgoing mail designated as being sent to an attorney "to ensure only actual attorneys will receive this special correspondence"); *cf.* Taylor v. Sterrett, 532 F.2d 462, 473-74 (5th Cir. 1976) (outgoing mail to an identifiable attorney must be sent unopened).

[68] Guajardo v. Estelle, 580 F.2d 748, 758 (5th Cir. 1978); *see* Taylor v. Sterrett, 532 F.2d 462, 475 (5th Cir. 1976) (incoming mail from an identifiable attorney must be opened in presence of prisoner and may not be censored or read).

[69] McCray v. Sullivan, 509 F.2d 1332, 1337 (5th Cir.), *cert. denied*, 423 U.S. 859 (1975); *cf.* Lynott v. Henderson, 610 F.2d 340, 344 (5th Cir. 1980) (regulations concerning visitation by a person other than an attorney must advance legitimate penological objectives).

[70]
> Our cases have established several general principles . . . . First, we have held that convicted prisoners do not forfeit all constitutional protections by reason of their conviction and confinement in prison . . . . But our cases also have insisted on a second proposition: simply because prison inmates retain certain constitutional rights does not mean that these rights are not subject to restrictions and limitations . . . . Third, maintaining institutional security and preserving internal order and discipline are essential goals that may require limitation or retraction of the retained constitutional rights of both convicted

Prison administrators, while exercising great discretion, may not obstruct an inmate's right to reach the courts. The fundamental constitutional right of access to the courts requires prison officials to help inmates prepare and file "meaningful" legal papers by providing access to adequate law libraries or adequate assistance from persons trained in law.[71] However, neither the fourteenth nor the sixth amendment requires the states to provide free attorneys for inmates once guilt has been adjudicated;[72] but the burden is on jail authorities[73] to show that "all inmates of a jail have adequate access to the courts through means other than by access to legal materials" where access to a law library is limited.[74] Even where prison law library facilities are adequate, courts have required the state to provide inmate writ-writers since the average inmate lacks the education to use effectively the facilities provided.[75] This requirement has been

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> prisoners and pretrial detainees . . . . Finally, . . . [because] the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions, [sic] [p]rison administrators . . . should be accorded wide-ranging deference in adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.

Bell v. Wolfish, 441 U.S. 520, 545-47 (1979).

[71] *See* Bounds v. Smith, 430 U.S. 817, 828 (1977) (a library need not be established in every prison within a state decentralized prison system where all prisoners had access to a library at another prison); Procunier v. Martinez, 416 U.S. 396, 419-21 (1974) (right of access to court unconstitutionally restricted by ban of attorney-client interviews by law students or paraprofessionals); Johnson v. Avery, 393 U.S. 483, 485 (1969) (in the absence of a legal assistance program, inmates may not be prevented from giving assistance to other inmates); Cruz v. Hauck, 515 F.2d 322, 331 (5th Cir. 1975) (when access to a library is limited, authorities must provide inmates other "adequate access" to courts); Morgan v. Sproat, 432 F. Supp. 1130, 1157-59 (S.D. Miss. 1977) (access to the courts must be provided to juveniles committed to a state training school); Stevenson v. Reed, 391 F. Supp. 1375, 1381 (N.D. Miss. 1975) (state must provide some source of legal assistance to inmates in addition to furnishing legal materials), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976); Gilmore v. Lynch, 319 F. Supp. 105, 110 (N.D. Cal. 1970) (inmates entitled to access to reasonable law library), *aff'd sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

[72] Stevenson v. Reed, 391 F. Supp. 1375, 1377-79 (N.D. Miss. 1975), *aff'd*, 530 F.2d 1207 (5th Cir.), *cert. denied*, 429 U.S. 944 (1976).

[73] Novak v. Beto, 453 F.2d 661, 664 (5th Cir. 1971) (the state has the burden of justifying its regulations limiting inmate assistance and of demonstrating that the legal needs of inmates are satisfied).

[74] Cruz v. Houck, 515 F.2d 322, 332 (5th Cir. 1975).

[75] Stevenson v. Reed, 391 F. Supp. 1375, 1381 (N.D. Miss. 1975), *aff'd*, 530 F.2d

held to encompass programs providing not only assistance in post conviction relief but also vindication of civil rights and representation in general civil matters.[76]

Where an attorney-client relationship exists, prison officials may restrict attorney-client contacts by enforcing reasonable rules and regulations for the maintenance and security of the prison.[77] Even the broadest discretion, however, will not justify deprivation of constitutional rights.[78]

In *Cruz v. Beto,*[79] twelve inmates and their attorney sued the Texas Department of Corrections for interference with the attorney-client relationship. The attorney was denied permission to consult with her clients, who were placed in punitive isolation for seeking her representation.[80] The Fifth Circuit found that the Department had acted in bad faith, arbitrarily and unjustifiably, and awarded damages to the twelve inmates based on the deprivation and humiliation they had suffered while segregated. The court also awarded damages to the attorney for humiliation, embarrassment, and improper deprivation of her first and fourteenth amendment rights.[81] Although the district court erroneously had required the defendants to show good faith, the Fifth

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1207 (5th Cir.), *cert. denied,* 429 U.S. 944 (1976); *see* Wolff v. McDonnell, 418 U.S. 539, 570 (1974) (state must provide uneducated prisoner with a means of intelligent communication with courts); Morgan v. Sproat, 432 F. Supp. 1130, 1158-59 (S.D. Miss. 1977) (juveniles of subnormal intellectual capacity committed to state training school must be provided access to the courts).

[76] *See* Procunier v. Martinez, 416 U.S. 396, 419 (1974) (access to the courts must be afforded prisoners seeking redress for violations of their constitutional rights); Corpus v. Estelle, 551 F.2d 68, 70-71 (5th Cir. 1977) (reasonable access to the courts must include access in general civil legal matters and civil rights actions).

In Mississippi, a county inmate or a person on his behalf may file a complaint concerning improper treatment with any county officer who must investigate the complaint. If the complaint is found to be legitimate, the officer must report it to the board of supervisors, which shall request the appearance of the complaining party and take appropriate action. MISS. CODE ANN. § 47-1-29 (1972).

[77] Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (attempts by attorney to do no more than seek redress for the rights of clients cannot be restricted).

[78] Wolff v. McDonnell, 418 U.S. 539, 600-01 (1974) (Douglas, J., dissenting) (broad discretion cannot be used to punish prisoners exercising their rights to counsel and access to the courts).

[79] 603 F.2d 1178 (5th Cir. 1979).

[80] *Id.* at 1180.

[81] *Id.* at 1185-86.

Circuit held that the burden lies properly with the plaintiffs to prove bad faith to justify an award of damages.[82] In this case the award was justified since the district court made a specific finding that the Department had acted in bad faith.[83]

The right of access to the courts has also been held to protect the privacy of attorney-client consultation. Such blatant intrusions as eavesdropping[84] and interference with attorney-client mail[85] have been held actionable. Furthermore, to protect the privacy of attorney-client consultations, one court required a prison to provide a room with adequate privacy for such interviews.[86]

In addition to access to the courts, the first amendment has been held to protect attorney-client correspondence. In *Procunier v. Martinez,*[87] California prison officials were charged with wrongfully obstructing outgoing inmate mail. After noting that the first amendment rights of persons outside the prison had been violated,[88] the Supreme Court held that prison officials had wrongfully obstructed outgoing mail.[89] Subsequently, in *Pell v. Procunier,*[90] the Supreme Court addressed the question whether prisoners' first amendment rights are violated by the opening of outgoing mail. Writing for the Court, Justice Stewart stated that "prisoners do retain those first amendment rights that are not inconsistent with their status as a prisoner with the legitimate penological objectives of the correctional system."[91]

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[82] *Id.* at 1184-85; *see* Procunier v. Navarette, 434 U.S. 555, 566 (1978) (prison officials' qualified immunity will not be denied absent proof of a "malicious intent to harm"); *cf.* Corpus v. Estelle, 551 F.2d 68, 70 (5th Cir. 1977) (state or state agency has burden of proving existence of reasonable alternatives in specific terms); Novak v. Beto, 453 F.2d 661, 664 (5th Cir. 1971) (same).

[83] 603 F.2d at 1185; *see* notes 159 through 218 and accompanying text *infra.*

[84] *See* Heidleberg v. Hammer, 577 F.2d 429, 432 (7th Cir. 1978) (eavesdropping on attorney-client conversations is actionable).

[85] *See* notes 66 and 67 *supra.*

[86] Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 309 (N.D. Ga. 1976); *see* Adams v. Carlson, 488 F.2d 619, 632 (7th Cir. 1973) (prison officials enjoined from limiting attorney-client conferences to partitioned visiting rooms).

[87] 416 U.S. 396 (1974).

[88] *Id.* at 398.

[89] *Id.* at 408-09.

[90] 417 U.S. 817 (1974).

[91] *Id.* at 822. The balancing of first amendment interests against legitimate goals and policies of the correctional system has been consistently followed in later cases. *See*

Interpreting *Martinez* and *Pell,* the Fifth Circuit in *Taylor v. Sterrett*[92] held that the first amendment right of unopened outgoing mail extends to any identifiable attorney who represents or is asked to represent a prisoner in any civil or criminal matter.[93] The court also held that incoming mail could be opened to inspect for contraband only in the presence of the inmate recipient.[94]

The first amendment has also been held to require state prison officials to furnish postage and stationery to indigent inmates for attorney-client correspondence.[95] Reasonable restrictions on attorney-client mail are permissible if they further a substantial governmental interest and the limitation on first amendment freedoms is deemed necessary.[96] Thus, governmental interests must be balanced with the inmate's fundamental right to unfettered access to the courts.[97] Unfettered access has

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Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 129-30 (1977) (mutual accommodation is sought between the objectives of prisons and first amendment rights); Guajardo v. Estelle, 580 F.2d 748, 760 (5th Cir. 1978) ("prisoners retain those first amendment rights not inconsistent with prison security, order, or rehabilitation").

[92] 532 F.2d 462 (5th Cir. 1976).

[93] *Id.* at 475; *see, e.g.,* Preston v. Cowan, 369 F. Supp. 14, 23 (W.D. Ky. 1973) (prisoners entitled to noncensorship of mail sent to identifiable attorneys); Palmigiano v. Travisono, 317 F. Supp. 776, 788-89 (D.R.I. 1970) (prison officials shall not open correspondence between inmate and licensed attorney). *Contra,* Cox v. Crouse, 376 F.2d 824, 826 (10th Cir. 1967) (per curiam) (warden allowed to read and communicate to attorney general the contents of letters from prisoners to attorneys), *cert. denied,* 389 U.S. 865 (1967).

[94] 532 F.2d at 465-69.

[95] *But see* Ford v. Schmidt, 577 F.2d 408, 410 (7th Cir. 1978) (system denying free postage to indigent inmates in emergencies deemed not to violate due process); Coleman v. Crisp, 444 F. Supp. 31, 32 (W.D. Okla. 1977) (inmates not permitted unlimited free postage).

[96] *See* Bell v. Wolfish, 441 U.S. 520, 545-47 (1979) (even though prison rules infringe on constitutional guarantees such as the first amendment, the constitutional considerations must be balanced against the purpose of the rule); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 125 (1977) (the necessities of prison administration allow tighter restrictions on prisoners' first amendment rights than would be permissible outside prison); Wolff v. McDonnell, 418 U.S. 539, 555 (1974) (there must be an accommodation between prison needs and specific constitutional rights infringed upon); Price v. Johnston, 334 U.S. 266, 285 (1948) (withdrawal of constitutional rights is justified by the special nature of penal systems).

[97] McCrary v. Sullivan, 509 F.2d 1332, 1337 (5th Cir. 1975) (quoting Adams v. Carlson, 488 F.2d 619, 630 (7th Cir. 1973)).

also been held to apply to county jails as well as state prisons.[98]

III. ATTORNEY'S FEES

A. *The American Rule*

At common law, the English courts had the power to award attorney's fees to successful plaintiffs.[99] However, as stated in 1967 by the Supreme Court in *Fleishmann Distilling Corp. v. Maier Brewing Co.*,[100] the American rule "has traditionally been that ordinarily attorneys' fees are not recoverable . . . ."[101] The basis of this rule was the belief that each party should bear the burden of his own costs.[102] Because of obvious inequities,[103] the American rule has been eroded by statutory and judicial exceptions.

B. *Exceptions*

1. Bad Faith

An established exception to the American rule applies when the losing party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons."[104] This punitive award is imposed to discourage actions that unduly delay or disrupt litigation or impede enforcement of court orders.[105] Also, some courts have recently emphasized that the burden of showing bad faith is on the plaintiff.[106] The court in *Gates v. Collier*[107] had no difficulty in awarding attorney's fees for the state's denial of unconstitutional practices and conditions at Parchman Prison. According to the court, litigation was necessary only because the state had unreasonably refused to comply with established constitutional principles concerning prisons.[108] Thus, attorney's fees of $41,750.00 were assessed by the court against funds appropriated for the state prison.[109] In *Miller v. Carson,*[110] a case "strikingly similar" to *Gates,* the Fifth Circuit followed the *Gates* rationale in holding a sheriff individually liable for attorney's fees.[111] Although both *Gates* and *Miller* involved massive reform, the Fifth Circuit has applied the bad faith exception to single incidents affecting one person.[112]

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[98] Cook v. Brockway, 424 F. Supp. 1046, 1050 (N.D. Tex.) (quoting Barlow v. Amiss, 477 F.2d 896, 898 (5th Cir. 1973)), *aff'd mem.*, 559 F.2d 1214 (5th Cir. 1977).

[99] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 n.18 (1975) (quoting Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 717 (1967) (early English court could award fees to successful attorney)).

[100] 386 U.S. 714 (1967).

[101] *Id.* at 717. Costs are recoverable against the losing party under 28 U.S.C. §§ 1920, 1923(a) (1976). Section 1920 specifies what a federal court may tax as cost. Docket fees and costs of filing briefs are specified under § 1923(a).

[102] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 250 & n.24 (1975) (discussing purpose for passing federal legislation concerning taxation of attorney's fees). *See also* H.R. REP. No. 50, 32d Cong., 1st Sess. (1852) (same).

[103] *See generally* Ehrenzweig, *Reimbursement of Counsel Fees and the Great Society*, 54 CALIF. L. REV. 792, 798-800 (1966) (brief discussion of the American rule); Kuenzel, *The Attorney's Fee: Why Not a Cost of Litigation?*, 49 IOWA L. REV. 75, 75-82 (1963) (examination of the American rule); McLaughlin, *The Recovery of Attorney's Fees: A New Method of Financing Legal Services*, 40 FORD. L. REV. 761, 765-70 (1972) (discussion of the American rule and its exceptions); Stoebuck, *Counsel Fees Included in Costs: A Logical Development*, 38 U. COLO. L. REV. 202, 207-21 (1966) (review of the American experience); Comment, *Court Awarded Attorney's Fees and Equal Access to the Courts*, 122 U. PA. L. REV. 636, 648-55 (1974) (argument for a new American rule); Note, *Attorney's Fees: Where Shall the Ultimate Burden Lie?*, 20 VAND. L. REV. 1216, 1226-30 (1967) (review of the qualifications to the American rule).

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[104] 6 MOORE'S FEDERAL PRACTICE ¶ 54.77[2] (2d ed. 1976), *quoted in* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975).

[105] Hutto v. Finney, 437 U.S. 678, 689 n.14 (1978); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 258-59 (1975); Newman v. Piggie Park Enterprises, Inc., 390 U.S. 400, 402 n.4 (1968) (per curiam); *cf.* FED. R. CIV. P. 56(g) (attorney's fees to be awarded against party filing summary judgment affidavits "in bad faith or solely for the purpose of delay"); *id.* 37(a)(4)(in motions to compel discovery, prevailing party may recover attorney's fees).

Additionally, civil contempt penalties may include attorney's fees. *See, e.g.,* Hutto v. Finney, 437 U.S. at 689 n.14; Aleyska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. at 258.

[106] Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1978); Young v. Peoria Hous. Auth., 479 F. Supp. 1093, 1097 (C.D. Ill. 1979).

[107] 371 F. Supp. 1368, 1371 (N.D. Miss. 1973), *vacated and remanded per curiam,* 522 F.2d 81 (5th Cir. 1975). The test for bad faith justifying an award of attorney's fees in the Fifth Circuit is also illustrated in Jinks v. Mays, 464 F.2d 1223, 1228 (5th Cir. 1972); Horton v. Lawrence County Bd. of Educ., 449 F.2d 290, 295 (5th Cir. 1971); Lee v. Southern Home Sites Corp., 429 F.2d 290, 295-96 (5th Cir. 1970); Williams v. Kimbrough, 415 F.2d 874, 875 (5th Cir. 1969) (per curiam), *cert. denied,* 396 U.S. 1061 (1970).

[108] 371 F. Supp. at 1371.

[109] *Id.* at 1373.

[110] 563 F.2d 741 (5th Cir. 1977).

[111] *Id.* at 754-56.

[112] Carter v. Noble, 526 F.2d 677, 678-79 (5th Cir. 1976) (per curiam).

2. Common Benefit

"Common benefit," another judicial exception, is based on the court's traditional equity power to award costs, including attorney's fees, to a party who recovers a fund for the benefit of others either from the fund or directly from the beneficiaries.[113] The rationale behind this exception is that to allow others to benefit from a plaintiff's work amounts to unjust enrichment since the others did not contribute to the litigation expenses.[114] In *Miller v. Carson*,[115] attorney's fees were awarded under the common benefit exception for successful vindication of constitutional rights regarding conditions in a county jail. Improvement of jail conditions was considered the "common benefit" to all the citizens of the county, justifying the award of attorney's fees against local officials.[116] The awarding of attorney's fees under this exception is not predicated upon a monetary recovery.[117]

3. Private Attorney General

In *Newman v. Piggie Park Enterprises, Inc.*,[118] the Supreme Court authorized an award of attorney's fees to the prevailing party to effectuate the purposes of Title II of the Civil Rights Act of 1964.[119] The Court explained that the prevailing party obtained relief not only for himself but as a "private attorney general," thus furthering the rights of all citizens under Title II.[120] Noting that only injunctive relief is available under Title II, the

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[113] Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 257 (1975); Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); Fleischmann Distilling Corp. v. Maier Brewing Co., 386 U.S. 714, 718-19 (1967); Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 166 (1939); Trustees v. Greenough, 105 U.S. 527, 533-34 (1882). *See generally* Dawson, *Lawyers and Involuntary Clients: Attorney's Fees From Funds*, 87 HARV. L. REV. 1597 (1974) (traces development of "common fund" mechanism).

[114] Mills v. Electric Auto-Lite Co., 396 U.S. 375, 391-92 (1970); Miller v. Carson, 401 F. Supp. 835, 849 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741, 754-56 (5th Cir. 1977) (the Fifth Circuit did not discuss this method of recovery).

[115] 401 F. Supp. 835, 853 (M.D. Fla. 1975), *aff'd in part and modified in part*, 563 F.2d 741, 754-56 (5th Cir. 1977).

[116] 401 F. Supp. at 853.

[117] *Id.* at 851.

[118] 390 U.S. 400, 401 (1968) (per curiam).

[119] 42 U.S.C. §§ 2000a-3(b) (1976).

[120] 390 U.S. at 402.

Court reasoned that the public interest would not be served by aggrieved parties' seeking of injunctive relief if successful plaintiffs are forced to pay their own attorney's fees. Thus, the Court awarded fees to encourage enforcement of citizens' rights.[121]

Following *Piggie Park,* several lower federal courts applied the "private attorney general" theory as an exception to the American rule in awarding attorney's fees.[122] In enjoining discriminatory practices, the Fifth Circuit has included attorney's fees to ensure an effective remedy.[123] Without financial or other assistance, private enforcement of constitutional rights has been deemed to be unlikely.[124]

In 1975, the Supreme Court, in *Alyeska Pipeline Service Co. v. The Wilderness Society,*[125] reversed an award of attorney's fees based on the private attorney general theory. Abrogating that exception, the Court adhered to a narrow interpretation of the American rule.[126] The Court added that while the traditional (bad faith, common benefit, and statutory) exceptions were still viable, none was applicable in the instant case.[127] Although *Alyeska Pipeline* involved protection of statutory rights, its sweeping language has been construed by the lower federal courts as precluding recovery of fees even where denial may emasculate congressional enactments specifically designed to protect constitutional rights.[128]

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[121] *Id.*

[122] *See, e.g.,* Hoitt v. Vilck, 495 F.2d 219, 220-21 (1st Cir. 1974) (state prison suit for deprivation of constitutional rights); Cornist v. Richland Parish School Bd., 495 F.2d 189, 192 (5th Cir. 1974) (per curiam) (racial discrimination); Wilderness Soc'y v. Morton, 495 F.2d 1026, 1032 (D.C. Cir. 1974) (environmental protection), *rev'd sub nom.* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240 (1975); Fairly v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (reapportionment for county board of supervisors); Lee v. Southern Home Sites Corp., 444 F.2d 143, 147-48 (5th Cir. 1971) (racial discrimination); Camprise v. Hamilton, 382 F. Supp. 172, 186 (S.D. Tex. 1974) (state prisoner sued jailer under 42 U.S.C. § 1983 (1976)), *cert. denied,* 429 U.S. 1102 (1977). *But see* Bradley v. School Bd., 472 F.2d 318, 327-31 (4th Cir. 1972) (Fourth Circuit refused to adopt the "private attorney general" rule), *vacated on other grounds,* 416 U.S. 696 (1974).

[123] Lee v. Southern Home Sites Corp., 444 F.2d 143, 144 (5th Cir. 1974). The Fifth Circuit in *Lee* also required that the district court prepare findings of fact to explain its grounds for denial of fees. *Id.* at 144; *accord,* Cooper v. Allen, 467 F.2d 836, 841 (5th Cir. 1972) (attorney's fees should be awarded unless a district court can articulate specific reasons for denying it).

[124] Lee v. Southern Home Sites Corp., 444 F.2d 143, 146 (5th Cir. 1971).

[125] 421 U.S. 240, 241 (1975).

[126] *Id.* at 269.

[127] *Id.* at 259.

4. Statutory

In 1976, Congress enacted the Civil Rights Attorney's Fees Awards Act,[129] on the heels of *Alyeska Pipeline.* The Act states that attorney's fees may be awarded to the prevailing party as part of the costs in suits under section 1983[130] and certain other statutes.[131] In passing section 1988, Congress bolstered the statutory exception[132] to the American rule by encouraging private litigation to enforce civil rights.[133] Furthermore, the Act has been interpreted to apply retroactively to suits pending at the time of enactment.[134] Although section 1988 grants trial courts "discretion" in awarding attorney's fees,[135] the Fifth Circuit has consistently held that absent special circumstances which would render an award of attorney's fees unjust, a prevailing party in section 1988 actions should be entitled to attorney's fees.[136] The courts have been liberal in their definition of "prevailing parties." Although the party must prevail on a significant issue that goes to the heart of the suit,[137] fees may be awarded on preliminary orders.[138] Moreover, failure to obtain a monetary recovery does not preclude application of section 1988.[139] On the contrary, awards have been granted even where the "prevailing party" was denied formal judicial relief.[140] Fees have also been allowed where the contested practices were voluntarily discontinued[141] or disposed of through consent decree.[142] Proper recipients have included legal services organizations[143] and court-appointed attorneys.[144] However, in calculating fee awards, it has been held that work spent on pendent state claims may not be considered.[145]

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[128] *See, e.g.,* Miller v. Carson, 401 F. Supp. 835, 850 (M.D. Fla. 1975), *aff'd in part and modified in part,* 563 F.2d 741, 754-56 (5th Cir. 1977) (although the district court based its award of attorney's fees on the "private attorney general" theory, on appeal the Fifth Circuit did not mention it).

[129] 42 U.S.C. § 1988 (1976) provides in part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [20 U.S.C. 1681 et. seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et. seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[130] 42 U.S.C. § 1983 (Supp. III 1979); *see* note 167 *infra.*

[131] *See* note 129 *supra.*

[132] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.33 (1975) (list of federal statutes that provide specifically for attorney's fees).

[133] Hutto v. Finney, 437 U.S. 678, 692 (1978); Crowe v. Lucas, 595 F.2d 985, 994 (5th Cir. 1979); Francia v. White, 594 F.2d 778, 781-82 (10th Cir. 1979); Donaldson v. O'Connor, 454 F. Supp. 311, 313 (N.D. Fla. 1978).

[134] *See, e.g.,* Miller v. Carson, 563 F.2d 741, 754 (5th Cir. 1977) (federal detainee sues county jail under § 1983 challenging conditions); Rainey v. Jackson State College, 551 F.2d 672, 675-76 (5th Cir. 1977) (first amendment challenge to termination of teacher's contract); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 (D. Mass. 1978) (§ 1983 suit challenging conditions at state penitentiary); Cruz v. Beto, 453 F. Supp. 905, 906 (S.D. Tex. 1977) (attorneys and inmates denied access to courts and each other), *aff'd,* 603 F.2d 1178 (5th Cir. 1979).

[135] *See* note 129 *supra. But cf.* Horton v. Lawrence County Bd. of Educ., 449 F.2d 793, 794 (5th Cir. 1971) (the court of appeals is not empowered to make an initial adjudication of attorney's fees).

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[136] *E.g.,* Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Concerned Democrats of Fla. v. Reno, 601 F.2d 891, 892 (5th Cir. 1979); Crowe v. Lucas, 595 F.2d 985, 993 (5th Cir. 1979); Criterion Club v. Board of Comm'rs, 594 F.2d 118, 120 (5th Cir. 1979) (per curiam); Morrow v. Dillard, 580 F.2d 1284, 1300 (5th Cir. 1978); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977); *accord,* Fischer v. Adams, 572 F.2d 406, 410-11 (1st Cir. 1978) (party prevailing on the merits of a discrimination complaint may be granted attorney's fees); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 n.3 (D. Mass. 1978) (plaintiff prevailing in § 1983 challenge to conditions at state penitentiary entitled to attorney's fees).

[137] Iranian Student Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Nadeau v. Helgemoe, 581 F.2d 275, 278-79 (1st Cir. 1978); Howard v. Phelps, 443 F. Supp. 374, 376 (E.D. La. 1978); *see* H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 2, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5909-10 (legislative history relevant to this point).

Some courts have held that the issue of attorney's fees goes to the heart of the suit, allowing attorney's fees to be awarded for work spent on obtaining the fees. *E.g.,* Hutto v. Finney, 437 U.S. 678, 681, 689 (1978); Gagne v. Maher, 594 F.2d 336, 344 (2d Cir. 1979); Lund v. Affleck, 587 F.2d 75, 77 (1st Cir. 1978); Donaldson v. O'Connor, 454 F. Supp. 311, 317 (N.D. Fla. 1978); Cruz v. Beto, 453 F. Supp. 905, 909 (S.D. Tex. 1977), *aff'd,* 603 F.2d 1178 (5th Cir. 1979); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 914 (D. Mass. 1978).

[138] Iranian Students Ass'n v. Edwards, 604 F.2d 352, 353 (5th Cir. 1979); Criterion Club v. Board of Comm'rs, 594 F.2d 118, 120 (5th Cir. 1979); Gagne v. Maher, 594 F.2d 336, 340-41 (2d Cir. 1979); Howard v. Phelps, 443 F. Supp. 374, 375 (E.D. La. 1978); *cf.* Ruiz v. Estelle, 609 F.2d 118, 118-19 (5th Cir. 1980) (fees awarded for obtaining class certification did not conclusively determine a question subject to later consideration; thus, it was not considered a final order capable of appeal).

[139] Donaldson v. O'Connor, 454 F. Supp. 311, 315 (N.D. Fla. 1978).

[140] *Id.* at 316; *see* H.R. REP. No. 94-1558, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS 5908, 5912-13 (stating that a court should award fees although no formal relief is granted to the prevailing party).

[141] *See* Inmates of Neb. Penal & Correctional Complex v. Greenholtz, 567 F.2d 1381, 1383 (8th Cir. 1977) (fees awarded where state prisoners were denied relief from unconstitutional parole practices).

[142] *See, e.g.,* Bradley v. School Bd. of Richmond, 416 U.S. 696, 722 n.28 (1974) (fees

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awarded for work performed short of ultimate determination); Brown v. Culpepper, 559 F.2d 274, 277 (5th Cir. 1977) (fees awarded even though suit settled by voluntary agreement); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 283 (6th Cir. 1974) (award based on consent decree); Adams v. Mathis, 458 F. Supp. 302, 305, 309 (M.D. Ala. 1978) (award granted upon a partial consent decree); M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 914 (D. Mass. 1978) (award granted upon consent decree).

In Parker v. Matthews, 411 F. Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom.* Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977), the court stated that before an award would be made upon a settlement, it would scrutinize all the circumstances surrounding the settlement, focusing primarily upon the reason the action was brought and whether or not the plaintiff wins on the central issues.

[143] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 262 n.36 (1975) (no intent to restrict recovery of attorney's fees by legal services organizations where other plaintiffs would be awarded such fees); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 286 (6th Cir. 1974) (awarding fees to legal services, rejecting the argument that the award should be denied since the legal services were partially funded by federal grants); Fairly v. Patterson, 493 F.2d 598, 606 (5th Cir. 1974) (fees awarded in reapportionment suit to attorneys of a nonprofit, tax-exempt foundation); Barret v. Kalinowski, 458 F. Supp. 689, 701 (M.D. Pa. 1978) (awarded fees to public service lawyers in a prisoner civil rights action, stating that such compensation encouraged the lawyers to engage in civil rights litigation); Donaldson v. O'Connor, 454 F. Supp. 311, 313 (N.D. Fla. 1978) (that counsel was supported by public funds was irrelevant to determination of fees awarded); Howard v. Phelps, 443 F. Supp. 374, 377 (E.D. La. 1978) (awarding fees in racial discrimination suit, stating that the only requirement for the award was the existence of an attorney-client relationship); Lund v. Affleck, 442 F. Supp. 1109, 1111-12 (D.R.I. 1977) (court noting that legal services organizations had limited resources, and that fees award would encourage representation in civil rights actions), *aff'd,* 587 F.2d 75 (1st Cir. 1978).

[144] Miller v. Carson, 563 F.2d 741, 756 (5th Cir. 1977). *But cf.* Davis v. Parratt, 608 F.2d 717, 718 (8th Cir. 1979) (§ 1983 not meant to compensate pro se litigants; presupposes an attorney-client relationship). For a discussion of prisoners' pro se complaints, see Haines v. Kerner, 404 U.S. 519, 520 (1972) (per curiam) (dismissal of pro se complaint reversed, stating that pro se complaints are held to less stringent standards); Covington v. Cole, 528 F.2d 1365, 1369-70 (5th Cir. 1970) (dismissal reversed where complaint had technical errors; court held that pro se complaints must be read very liberally).

[145] Barrett v. Kalinowski, 458 F. Supp. 689, 700 (M.D. Pa. 1978); *cf.* Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208, 1215 (3d Cir. 1978) (plaintiff is not entitled to attorney's fees under § 1988 if he prevails solely on a pendent federal statutory claim). *But cf.* Lund v. Affleck, 587 F.2d 75, 76-77 (1st Cir. 1978) (fact that plaintiff prevailed solely on pendent federal statutory claim did not preclude award of attorney's fees under § 1988).

C. Assessment

Section 1988 directs courts to award "reasonable" fees.[146] Although mathematical precision is not required, the burden is on the plaintiff to prove a "reasonable" fee.[147] The court need only ascertain, through timetables or its own observation, that the hours claimed reasonably reflect the services performed.[148] The Fifth Circuit case of *Johnson v. Georgia Highway Express, Inc.*[149] is considered the "guidepost" in calculating a reasonable fee.[150] The court's test comprised twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the issues; (3) the skill required to perform the legal services properly; (4) preclusion of other employment as a result of the attorney's acceptance of the case; (5) the customary fee in the area;[151] (6)

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[146] *See* note 129 *supra.*

[147] Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 720 (5th Cir. 1974) (plaintiff has the burden of proving attorney's fees just as those who have the burden of proving any other money claim); Cruz v. Beto, 453 F. Supp. 905, 907-08 (S.D. Tex. 1977) (plaintiff has burden of proving fees), *aff'd,* 603 F.2d 1178 (5th Cir. 1979). *Compare* Brown v. Stackler, 460 F. Supp. 446, 447 (N.D. Ill. 1978) (attorney's fees denied entirely when court considered them outrageously excessive and a reasonably competent attorney could not have spent one eighth the time claimed) *with* Miller v. Carson, 401 F. Supp. 835, 858 (M.D. Fla. 1975) (attorney's fees reduced because some work could have been assigned to a paralegal), *aff'd in part and modified in part on other grounds,* 563 F.2d 741 (5th Cir. 1977).

[148] *See* Cruz v. Beto, 453 F. Supp. 905, 908 (S.D. Tex. 1977) (where the court is "intimately familiar" with the litigation, it may "rely chiefly on its own observations, and experience" in deciding fee awards), *aff'd,* 603 F.2d 1178 (5th Cir. 1978). *But see* Hutto v. Finney, 437 U.S. 678, 691-92 & nn.17-18 (1978) (Court awarded "substantial attorneys' fees" to punish defendants for bad faith rather than to compensate plaintiff's attorneys for services performed); Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 284 (6th Cir. 1974) (fee awards based on defendant's bad faith are punitive in nature).

[149] 488 F.2d 714 (5th Cir. 1974).

[150] The House and Senate reports, *see* S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5913; H.R. Rep. No. 94-1358, 94th Cong., 2d Sess. 4 (1976), state that courts should use the twelve standards enumerated in *Johnson* in determining the reasonableness of attorney's fees under § 1988. *See* Barrett v. Kalinowski, 458 F. Supp. 689, 707 (M.D. Pa. 1978) (factors identified in *Johnson* are to be considered by the court in the adjustment of fees); Adams v. Mathis, 458 F. Supp. 302, 309 (M.D. Ala. 1978) (*Johnson* provides the standards); Cruz v. Beto, 453 F. Supp. 905, 909 (S.D. Tex. 1977) (court used seven of the *Johnson* guidelines to fix the hourly rate of compensation), *aff'd,* 603 F.2d 1178 (5th Cir. 1979); Miller v. Carson, 401 F. Supp. 835, 857-60 (M.D. Fla. 1975) (court expressly applied the twelve guidelines in *Johnson*), *aff'd in part and modified in part on other grounds,* 563 F.2d 741 (5th Cir. 1977).

[151] *See* Donaldson v. O'Connor, 454 F. Supp. 311, 314 (N.D. Fla. 1978) (fees awarded

whether the fee was on a fixed or contingent basis; (7) time limits imposed by the client in particular circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.[152] Costs of litigation have also been included in awards.[153]

D. Eleventh Amendment

To contest an award of attorney's fees, defendants frequently claim immunity under the eleventh amendment. Although the eleventh amendment expressly prohibits any suits against the states in federal court,[154] the Supreme Court has allowed exceptions to this rule. In the landmark decision of *Ex parte Young*,[155] the Court held that although the eleventh amendment barred retrospective relief against a state, it did not bar injunctive prospective relief against a state even where the cost of compliance might be borne by the state. The Court has continued to deny retrospective relief against a state[156] except

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generally based on customary fee in area).

[152] 488 F.2d at 717-19.

[153] *See* Hutto v. Finney, 437 U.S. 678, 696 (1978) (a state may be treated as any other litigant when a federal court assesses costs); Miller v. Carson, 401 F. Supp. 835, 860-61 (M.D. Fla. 1975) (defendants were assessed with costs of service of process, witness fees, court reporter's fees for depositions, photographs, printing, publication and reproduction of documents), *aff'd in part and modified in part on other grounds,* 563 F.2d 741 (5th Cir. 1977). *But see* Barrett v. Kalinowski, 458 F. Supp. 689, 708 (M.D. Pa. 1978) (request for costs should have been submitted to court clerk since § 1988 did not empower the court to award costs as part of the relief).

[154] The eleventh amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced and prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State." U.S. CONST. amend. XI.

[155] 209 U.S. 123, 148 (1908); *see* Quern v. Jordan, 440 U.S. 332, 337, 346-49 (1979) (state immune from retroactive monetary relief but not from the cost of sending out notices pursuant to a court order); Milliken v. Bradley, 433 U.S. 267, 293 (1977) (Powell, J., concurring) (state ordered to pay about $5.8 million to help defray costs of desegregation decree for the Detroit school system); Edelman v. Jordan, 415 U.S. 651, 667-68 (1974) (same).

[156] *See, e.g.,* Quern v. Jordan, 440 U.S. 332, 345 (1979) (in a § 1983 action the eleventh amendment bars retrospective relief against a state); Edelman v. Jordan, 415 U.S. 651, 677 (1974) (same); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 574, 579-80 (1946) (plaintiff unable to recover taxes wrongfully paid to the state); Ford Motor

where Congress has enacted legislation to enforce the fourteenth amendment, which overrides the eleventh amendment.[157] Since Congress passed section 1988 to aid enforcement of the fourteenth amendment, states are not immune from paying attorney's fees.[158] Furthermore, since local governments are not protected by the eleventh amendment,[159] they are not immune from paying attorney's fees under section 1988.[160]

E. *Mississippi*

In Mississippi the general rule is that, absent a statute, attorney's fees are not recoverable unless the defendant's actions warrant an award of punitive damages.[161] Although counsel ap-

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Co. v. Department of Treasury, 323 U.S. 459, 464 (1945) (same); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51-53 (1944) (same).

[157] Fitzpatrick v. Bitzer, 427 U.S. 445, 456-57 (1976). The eleventh amendment is limited by the enforcement provisions of the fourteenth amendment, which grant to Congress the authority to enforce "by appropriate Legislation" the rights guaranteed by the fourteenth amendment. *Id.* Thus, Congress may override the states' eleventh amendment immunity by enacting legislation to enforce the fourteenth amendment. Not all legislation passed to enforce the fourteenth amendment, however, overrides the eleventh amendment. *See* Quern v. Jordan, 440 U.S. 332, 342-43 (1979) (Congress did not intend for § 1983 to override the eleventh amendment); Edelman v. Jordan, 415 U.S. 651, 663 (1974) (same); Tenney v. Brandhove, 341 U.S. 367, 376 (1951) (same). There must be a clear showing of congressional intent to abrogate eleventh amendment immunity. Employees v. Missouri Public Health Dep't, 411 U.S. 279, 285 (1973).

[158] Hutto v. Finney, 437 U.S. 678, 693-94 (1978) (citing S. Rep. No. 94-1011, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U.S. Code Cong. & Ad. News 5908, 5913; H.R. Rep. No. 94-1558, 94th Cong., 2d Sess. 4 (1976)). *See, e.g.,* Rainey v. Jackson State College, 551 F.2d 672, 675 (5th Cir. 1977) (§ 1988 lifted the eleventh amendment bar to payment of attorney's fees by the state); Guajardo v. Estelle, 432 F. Supp. 1373, 1387 (S.D. Tex. 1977) (same), *aff'd in part and rev'd in part on other grounds,* 580 F.2d 748 (5th Cir. 1978).

The Court in *Hutto* recognized that the congressional intent of § 1988 was to override the eleventh amendment since two attempts to amend the Act to immunize states from fee awards had been defeated. 437 U.S. at 694. Awards against an official in his individual capacity are not affected by § 1988. M.C.I. Concord Advisory Bd. v. Hall, 457 F. Supp. 911, 913 n.1 (D. Mass. 1978) (citing *Hutto*).

[159] Quern v. Jordan, 440 U.S. 332, 338 (1979); Monell v. Department of Social Servs., 436 U.S. 611, 690 n.54 (1978); Edelman v. Jordan, 415 U.S. 651, 667 n.12 (1974).

[160] *See, e.g.,* Adams v. Mathis, 458 F. Supp. 302, 309 (M.D. Ala. 1978) (50% of attorney's fees assessed against county defendants and 50% against state defendants); Miller v. Carson, 401 F. Supp. 835, 862 (M.D. Fla. 1975) (attorney's fees and costs awarded against county sheriff's fund and against sheriff in his individual capacity), *aff'd in part and modified in part,* 563 F.2d 741 (5th Cir. 1977).

[161] Subscribers Cas. Reciprocal Exch. v. Totaro, 370 So. 2d 1342, 1342 (Miss. 1979);

pointed to defend an indigent during the criminal process is entitled to compensation,[162] apparently no statutes provide for attorney's fees in civil actions before or after trial. Also, attorney's fees are rarely awarded for suits in equity since punitive damages are not ordinarily awarded in chancery.[163] Thus, awards of attorney's fees in civil actions are limited to actions at law where a party's conduct warrants punitive damages.

IV. LIABILITY ON THE MERITS

A. *Qualified Immunity*

The eleventh amendment has also been asserted as a bar to liability on the merits in suits against state governments. Since states are immune from retroactive damages to be paid from the state treasury,[164] the courts are only free to order prospective injunctive relief against the state, though compliance may require large expenditures of state funds.[165] State officials, however, are not afforded immunity under the eleventh amendment if they deprive another of federal rights under color of state

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Gulf Steamship Co. v. Polk, 370 So. 2d 1348, 1351 (Miss. 1979); Bellefonte Ins. Co. v. Griffin, 358 So. 2d 387, 391 (Miss. 1978).

[162] MISS. CODE ANN. § 99-15-17 (1972) (enumerates maximum compensation for attorneys appointed to represent indigents under MISS. CODE ANN. § 99-15-15 (1972)).

[163] Subscribers Cas. Reciprocal Exch. v. Totaro, 370 So. 2d 1342, 1342 (Miss. 1979); Gulf Steamship Co. v. Polk, 370 So. 2d 1348, 1351 (Miss. 1979); Dedeaux v. Davro, 275 So. 2d 863, 864 (Miss. 1973); Bridges v. Land, 252 So. 2d 209, 211 (Miss. 1971).

[164] Quern v. Jordan, 440 U.S. 332, 337 (1979); Edelman v. Jordan, 415 U.S. 651, 663 (1974); Kennecott Copper Corp. v. State Tax Comm'n, 327 U.S. 573, 574, 579-80 (1946); Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945); Great N. Life Ins. Co. v. Read, 322 U.S. 47, 51-53 (1944); Hansburg v. Regents, 596 F.2d 944, 949 n.16 (10th Cir. 1979); Jagnandan v. Giles, 538 F.2d 1166, 1176 (5th Cir. 1976); Davis v. Griffin-Spalding County Bd. of Educ., 445 F. Supp. 1048, 1054 (N.D. Ga. 1976).

[165] *E.g.*, Milliken v. Bradley, 433 U.S. 267, 293 (1977) (court granted injunctive relief against state requiring an expenditure of almost $6 million to defray costs of integrating Detroit school system); Williams v. Edwards, 547 F.2d 1206, 1212 (5th Cir. 1977) (injunction upheld since it provided only that if state continued operation of prisons, it must be in a constitutional manner, requiring expenditures of state funds); Alberti v. Sheriff of Harris County, 406 F. Supp. 649, 669 (S.D. Tex. 1975) (lack of adequate monetary resources does not excuse state's or local government's duty to provide facilities that meet constitutional standards); Gates v. Collier, 349 F. Supp. 881, 897 (N.D. Miss. 1972) (court realized that injunctive relief would require substantial expenditures of funds), *aff'd in part and modified in part,* 501 F.2d 1291 (5th Cir. 1974).

law.[166] Section 1983,[167] focusing on the nature of the official's action, provides a cause of action for deprivation of constitutional rights under color of state law.[168]

Ancient tort law and strong public policy support some degree of immunity.[169] A state official has a "qualified" immunity commensurate with the scope of discretion and responsibility inherent in his office.[170] In *Scheuer v. Rhodes*,[171] the United States

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[166] *See, e.g.*, Wood v. Strickland, 420 U.S. 308, 322 (1975) (school board members personally liable for unconstitutional discharge of three students); Perez v. Rodriguez Bou, 575 F.2d 21, 23-24 (1st Cir. 1978) (university chancellor personally liable for unconstitutional discharge of students); West v. Keve, 571 F.2d 158, 162-63 (3d Cir. 1978) (case remanded to determine if prison official was personally liable for denying prisoner's medical needs); Palmer v. Penn-Ohio Road Materials, Inc., 470 F. Supp. 1199, 1203 (W.D. Pa. 1979) (absent immunity other than the eleventh amendment, a public employee is liable for tortious conduct).

[167] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subject, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[168] *Id.*

[169] *See* Martinez v. California, 100 S. Ct. 553, 557-58 (1980) (statute providing immunity for parole officers furthers policy of rehabilitation of inmates); Wood v. Strickland, 420 U.S. 308, 321 (1975) (public school officials must be offered some degree of immunity so they can perform their duties without undue timidity); Cruz v. Beto, 603 F.2d 1178, 1183 (5th Cir. 1978) (noting common law origins of qualified immunity and its underlying policies); Bogard v. Cook, 405 F. Supp. 1202, 1217 (N.D. Miss. 1975) (court refused to hold state penitentiary officials personally liable for damages on the basis of negligence as a matter of policy), *aff'd*, 586 F.2d 399 (5th Cir. 1978); Morgan v. Cook, 236 So. 2d 749, 750 (Miss. 1970) (management and operation of prisons, if reasonable, are within sound discretion of prison administration).

[170] *See* Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (public officials are not completely shielded from liability); O'Connor v. Donaldson, 422 U.S. 563, 569 (1975) (issue of liability for damages hinges on whether official knew or should have known that his actions, taken within the scope of his responsibility, violated constitutional rights); Wood v. Strickland, 420 U.S. 308, 322 (1975) (same); Scheuer v. Rhodes, 416 U.S. 232, 247 (1974) (scope of qualified immunity based on amount of discretion and responsibility of office and on circumstances at time of action); McNamara v. Moody, 606 F.2d 621, 625 (5th Cir. 1979) (qualified immunity varies with official's discretion and responsibility); Cruz v. Beto, 603 F.2d 1178, 1182 (5th Cir. 1979) (citing *Scheuer* for scope of qualified immunity); Knell v. Bensinger, 522 F.2d 720, 723 (7th Cir. 1975) (same); Norton v. McShane, 332 F.2d 855, 857-58 (5th Cir. 1964) (using "scope of authority" analysis in determining extent of immunity).

[171] 416 U.S. 232 (1974).

Supreme Court noted that qualified immunity is based upon an official's good faith belief that his actions were proper and that reasonable grounds existed for his belief at the time of his actions.[172] Since the Governor of Ohio was found to have "intentionally, recklessly, willfully, wantonly" and unnecessarily deployed the Ohio National Guard on the Kent State campus,[173] the Court held that he was "stripped of his official or representative character" and was personally liable for his actions.[174]

In 1975 the Supreme Court in *Wood v. Strickland*[175] developed a two-part test to determine an official's personal immunity. A school board official would be held liable under section 1983 if he (1) "knew or reasonably should have known" that his official action would violate another's constitutional rights—the objective standard; or (2) if he acted with malicious intent to deprive another of constitutional rights—the subjective standard.[176] Even if acting on a sincere subjective belief, the official would lose his qualified immunity under the objective test if his actions contradict "settled, indisputable law."[177]

Following these precedents, the Supreme Court in *Procunier v. Navarette*[178] elucidated the two-part *Wood* test.[179] The Court applied the objective standard without alteration, stating that no immunity exists if (1) the constitutional right in issue was clearly established at the time of the official's contested conduct; (2) the official knew or reasonably should have known of the right; and (3) if the official knew or should have known that his conduct violated that constitutional right.[180] The "malicious intent" standard of *Wood* was interpreted to include not only intentional behavior but also acts which, regardless of intent, were "substantially certain" to produce injury.[181] This standard echoes the congressional intent behind section 1983, *i.e.*, to hold state officials liable in damages for some actions without effecting a wholesale revocation of qualified immunities.[182]

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[172] *Id.* at 247-48.

[173] *Id.* at 235.

[174] *Id.* at 237. The Supreme Court did not reach the merits of the petitioners' claims, holding only that the district court's dismissal of their claims was improper and remanding for further proceedings. *Id.* at 250.

[175] 420 U.S. 308 (1975).

[176] *Id.* at 322.

[177] *Id.* at 321.

[178] 434 U.S. 555 (1978).

[179] *Id.* at 562.

[180] *Id.*

In *Navarette,* the Supreme Court extended to state prison officials the same qualified immunity previously granted a university president, national guard members,[183] school board members,[184] a superintendent of a state mental institution,[185] and a policeman.[186] Because of their greater responsibilities, the Court noted that immunity granted state officials is generally broader than that granted local officials.[187] However, state officials must first satisfy the tests established in *Scheuer* and *Wood* to justify protection.[188]

Recently, the Supreme Court in *Owen v. City of Independence*[189] determined whether municipalities may assert the good faith of their officials as a defense under section 1983. The Court explained that since section 1983 does not mention any immunities on its face,[190] immunity is allowed only where strong public policy supports it,[191] or where the immunity was firmly rooted in the common law prior to the enactment of section 1983.[192] After determining that neither of these factors was present,[193] the Court held that municipalities may not assert the good faith of their officials as a defense for injurious conduct under section 1983.[194]

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[181] *Id.* at 566.

[182] *Id.* at 565-66.

[183] Scheuer v. Rhodes, 416 U.S. 232, 242-47 (1974).

[184] Wood v. Strickland, 420 U.S. 308, 321-22 (1975).

[185] O'Connor v. Donaldson, 422 U.S. 563, 577 (1975).

[186] Pierson v. Ray, 386 U.S. 547, 577 (1967).

[187] 434 U.S. at 561-62; *see* Cruz v. Beto, 603 F.2d 1178, 1184 (5th Cir. 1979) (drawing distinction between common law defenses available to policemen and defenses available to director of statewide prison system).

[188] *See* text accompanying notes 171 through 177 *supra.*

[189] 445 U.S. 622 (1980).

[190] *Id.* at 635.

[191] *Id.* at 637; *see, e.g.*, Procunier v. Navarette, 434 U.S. 555, 561-62 (1978) (qualified immunity for prison officials); O'Connor v. Donaldson, 422 U.S. 563, 576-77 (1975) (same); Wood v. Strickland, 420 U.S. 308, 321 (1975) (qualified immunity for school board); Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (qualified immunity for national guardsmen).

[192] 445 U.S. at 637-38; *see, e.g.*, Imbler v. Pachtman, 424 U.S. 409, 421-24 (1976) (absolute immunity for prosecutors); Pierson v. Ray, 386 U.S. 547, 553-54 (1967) (absolute immunity for judges).

In 1978 the Fifth Circuit decided *Bogard v. Cook,*[195] a section 1983 action filed by a Parchman inmate against supervisory officials in their individual capacities for personal injuries he had suffered at Parchman. Although the court found that Bogard's constitutional rights had been violated,[196] the defendants were protected from damages by their qualified immunity[197] since they were not shown to be personally involved.[198]

The Fifth Circuit in *Bogard* elucidated its view on state officials' qualified immunity.[199] Under the objective test, the court noted that the defendant is liable if he "knew or reasonably should have known" that his conduct, though sincere, violated constitutional rights.[200] Thus, the existence of clearly established rights is essential.[201] Discussing the subjective test, the court stated that the shield of qualified immunity is "pierced only on a showing of misconduct more egregious than ordinary negligence."[202] Nonfeasance as well as misfeasance may be actionable. In either event the plaintiff must show that the defendant's conduct was so grossly negligent that, regardless of his actual intent, he must have desired the harmful results of his action or inaction.[203] Thus, the court reasoned in terms of actual intent rather than in terms of negligence.[204]

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[193] 445 U.S. at 638-50.

[194] *Id.* at 657. The Court noted that municipal officials are still entitled to a qualified immunity from personal damages as long as the official acts in good faith. *Id.*

[195] 586 F.2d 399 (5th Cir. 1978), *cert. denied,* 100 S. Ct. 173 (1979).

[196] 586 F.2d at 420.

[197] *Id.* at 410.

[198] *Id.* at 412.

[199] *See id.* at 411-12.

[200] *Id.* at 411.

[201] *Id.*

[202] *Id.* at 406.

[203] *Id.* at 412.

[204] *Id.; see* Jones v. Diamond, 594 F.2d 997, 1035 (5th Cir. 1979) (Rubin, J., concurring in part and dissenting in part) (only negligence required for a § 1983 action, but more required to abrogate official immunity), *rehearing granted,* 602 F.2d 1243 (5th Cir. 1979).

The court in *Bogard* followed *Navarette* and applied a "gross negligence" standard to the subjective "malicious intent" test. However, other decisions cited by the court confused the intent required to establish a cause of action under section 1983 (the nature of the conduct) with the intent required to abrogate qualified immunity (the degree of culpability).[205] The court found that Bogard had been subjected to summary punishments, which, by definition, implied a subjective intent to cause harm.[206] The court refused, however, to equate punishment and intent because to do so "would eliminate qualified immunity in the eighth amendment context."[207]

The year after *Bogard* the Fifth Circuit in *Fiedler v. Bosshard*[208] heard similar claims against county jail officials.[209] In *Bosshard*, the court did equate punishment and intent to award damages, finding that the plaintiffs had shown the callous indifference necessary to establish an eighth amendment cause of action under section 1983.[210] The court stated further that if the plaintiff establishes the requisite indifference, he has also shown the malicious intent necessary to negate immunity.[211] Thus, in this case, the same standard, *i.e.*, "gross negligence," was applied to both the nature of the conduct and the degree of culpability.[212]

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[205] 586 F.2d at 412-15. In determining the prison officials' immunity, the Fifth Circuit cited Burton v. Waller, 502 F.2d 1261, 1274 (5th Cir. 1974), *cert. denied*, 420 U.S. 964 (1975), for the proposition that state officials' liability under § 1983 was no more nor less than that under state law. However, *Burton* discussed intent in the context of stating a cause of action for damages under § 1983. 502 F.2d at 1273-74. The court also compared the duty of a sheriff to exercise reasonable care in the treatment of his prisoners, established in Farmer v. State, 224 Miss. 96, 105, 79 So. 2d 528, 531 (1955) and Mississippi v. Durham, 444 F.2d 152, 157 (5th Cir. 1971), to the scope of immunity afforded a state official. Although a distinction was drawn between the punishment necessary to state a cause of action and the intent required to overcome qualified immunity, the court cited cases which required gross negligence for a cause of action under § 1983 in discussing the gross negligence rquired under the subjective *Wood* test. 586 F.2d at 412 n.7 (citing Burton v. Waller, 502 F.2d 1261, 1274 n.6A (5th Cir. 1974) (question of whether gross negligence is sufficient to state a cause of action under § 1983 left open); Parker v. McKeithen, 488 F.2d 553, 556 (5th Cir.) (gross negligence sufficient to state a cause of action under § 1983), *cert. denied*, 419 U.S. 838 (1974); Roberts v. Williams, 456 F.2d 819, 828 (5th Cir. 1972) (allegation of intent sufficient to state a cause of action under § 1983), *cert. denied*, 404 U.S. 866 (1971)).

[206] 586 F.2d at 420.

[207] *Id.*

[208] 590 F.2d 105 (5th Cir. 1979).

[209] *Id.* at 107; *see* Bogard v. Cook, 405 F. Supp. 1202, 1215 (N.D. Miss. 1975) (state prison warden not held to same standard as county sheriff), *aff'd*, 586 F.2d 399 (5th Cir. 1975), *cert. denied*, 100 S. Ct. 173 (1979).

[210] 590 F.2d at 110; *see, e.g.*, Estelle v. Gamble, 429 U.S. 97, 106 (1976) (deliberate and callous indifference must be shown to establish a § 1983 claim for inadequate medical treatment); McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979) (facts alleging

In 1979, the Fifth Circuit in *Cruz v. Beto*[213] held Texas prison officials liable for damages for interfering with Cruz's attorney-client relationships with state prisoners.[214] To establish immunity, the lower court placed the burden on defendants to show that their actions were objectively reasonable and undertaken in good faith.[215] The Fifth Circuit agreed with the standard applied by the lower court but held that the burden of proof properly lay with the plaintiffs.[216] The court explained

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confinement for up to 23½ hours per day for monthly periods sufficient to make out a § 1983 action); Reeves v. City of Jackson, 608 F.2d 644, 652 (5th Cir. 1979) (callous and conscious indifference must be established to state an eighth amendment claim under § 1983); Cruz v. Beto, 603 F.2d 1178, 1184 n.2 (5th Cir. 1979) (placing burden on plaintiff consistent with burden for eighth amendment claims); Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979) (callous, conscious indifference must be shown to state a cause of action under § 1983); Jones v. Diamond, 594 F.2d 997, 1019 (5th Cir.) (deliberate indifference required for eighth amendment violation), *rehearing granted*, 602 F.2d 1243 (5th Cir. 1979); Williams v. Edwards, 547 F.2d 1206, 1211 (5th Cir. 1977) (totality of conditions at state prison violate the eighth amendment); Gates v. Collier, 501 F.2d 1291, 1309 (5th Cir. 1974) (same); Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971) (damages available under § 1983 for violations of constitutional rights), *cert. denied*, 404 U.S. 1049 (1972); Williams v. Field, 416 F.2d 483, 486 (9th Cir. 1969) (announcing three tests for eighth amendment violations: (1) conduct shocks court's conscience or violates fundamental fairness; (2) punishment is disproportionate to offense; (3) conduct that goes beyond a legitimate penal interest), *cert. denied*, 397 U.S. 1016 (1970); Coleman v. Crisp, 444 F. Supp. 31, 33 (W.D. Okla. 1977) (doctor's being unable to treat eye conditions does not show a callous indifference); James v. Murphy, 392 F. Supp. 641, 644 (M.D. Ala. 1975) (eighth amendment claim should not be dismissed if plaintiff could possibly prove gross negligence from facts).

Arguably plaintiffs need not worry about a county official's intent since political subdivisions are now liable for all injurious conduct under § 1983. *Cf.* Owen v. City of Independence, 445 U.S. at 638 (municipalities may not assert good faith of their officers as a defense under § 1983).

[211] 590 F.2d at 110.

[212] *Id.*

[213] 603 F.2d 1178 (5th Cir. 1979).

[214] *Id.* at 1186.

[215] *Id.* at 1184-85 (citing Procunier v. Navarette, 434 U.S. 555 (1978)); *see* Scheuer v. Rhodes, 416 U.S. 232, 245-50 (1974) (dependents allowed good faith defense in § 1983 action); Pierson v. Ray, 386 U.S. 547, 557-58 (1967) (same).

[216] 603 F.2d at 1184-85; *see* Bogard v. Cook, 586 F.2d 399, 420-21 (5th Cir. 1978)

that requiring the plaintiff to show malicious intent is consistent with establishing a prima facie section 1983 case.[217] Thus, an official is immune unless the plaintiff can show that he or she was not acting in good faith.[218] Finally, the court noted that if good faith were a defense to the common law tort, the defendant could raise it to avoid liability under section 1983.[219]

While the Supreme Court in *Navarette* established that "gross negligence" is required to abrogate a state official's qualified immunity, it did not decide whether simple negligence is enough to state a cause of action under section 1983.[220] Instead, it skirted the issue by finding that no right had been clearly established at the time the action was filed.[221] In *Baker v. McCollan*[222] the Supreme Court again deferred deciding whether simple negligence can give rise to section 1983 liability. In that case, the court of appeals, using a state tort law analysis, found the defendants to be protected by their qualified immunity under *Navarette*.[223] The Supreme Court, however, stated that the first level of inquiry in a section 1983 cause of action is "whether the plaintiff has been deprived of a right secured by the Constitution and laws of the United States."[224] If no such constitutional right exists, the defendant's intent is irrelevant.[225] The Court explained that section 1983 applies where rights protected by the

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(proof of lack of good faith required in § 1983 action), *cert. denied*, 100 S. Ct. 173 (1979).

[217] 603 F.2d at 1184 n.2.

[218] *Id.* at 1183; *see* McNamara v. Moody, 606 F.2d 621, 626 (5th Cir. 1979) (prison officials afforded qualified immunity when acting in good faith); Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979) (no cause of action under § 1983 unless intent is shown); *cf.* Turner v. Raynes, 611 F.2d 92, 97 (1980) (judge has absolute immunity while acting within his jurisdiction in a § 1983 action).

[219] 603 F.2d at 1184; *see, e.g.*, Owen v. City of Independence, 445 U.S. at 638 (defense is available if it existed at time § 1983 became law); Pierson v. Ray, 386 U.S. 547, 557 (1967) (good faith is available under § 1983 where same protection was available at common law); Roberts v. Williams, 456 F.2d 819, 826 (5th Cir. 1972) (same), *cert. denied*, 404 U.S. 866 (1971); Whirl v. Kern, 407 F.2d 781, 789 (5th Cir.) (same), *cert. denied*, 396 U.S. 901 (1969). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 183 (4th ed. 1971) (immunities of public officials).

[220] 434 U.S. at 560 n.14.

[221] *Id.* at 565.

[222] 443 U.S. 137 (1979).

[223] *Id.* at 142.

[224] *Id.* at 140.

[225] *Id.*

Constitution have been violated, not where duties of care arising out of tort law have been violated. A remedy for violation of traditional tort law must be sought in state court.[226]

Recently, in *Martinez v. California*,[227] the Supreme Court was confronted with the scope of a state parole officer's immunity for the release of a prisoner who subsequently raped and murdered a fifteen year old girl.[228] In this case, a California statute immunized parole board officials from all liability for parole release determinations.[229] The Court agreed that the state statute was constitutional as applied to claims arising under state law.[230] However, the Court held that the statute did not control a federal cause of action, even when asserted in state court.[231] *Martinez* implies that federal law controls immunity claims arising under section 1983,[232] but it does not address the scope of immunity since the plaintiffs did not meet the first level of inquiry established in *Baker*.

B. Respondeat Superior

In 1979, in *Baskin v. Parker*[233] the Fifth Circuit refused to apply state law in a section 1983 action to hold a sheriff vicariously liable for his deputy's wrongdoing.[234] Previously, courts had applied the state law of respondeat superior to section 1983 actions,[235] but in 1978 the Supreme Court in *Monell v. Department of Social Services*[236] held that a city could be held liable under section 1983 for its constitutional violations if the injury resulted from an action by a city official or pursuant to an official policy.[237] Finally, the court in *Baskin* found that *Monell* had rejected the doctrine of respondeat superior as a basis for recovery under section 1983 to prevent the development of *lex loci.*[238]

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[226] *Id.* at 146.

[227] 100 S. Ct. 553 (1980).

[228] *Id.* at 556.

[229] *Id.*

[230] *Id.* at 558.

[231] *Id.*

[232] *Id.* at 558 n.8; *see* Owen v. City of Independence, 445 U.S. at 647 n.30 (immunity under § 1983 is controlled by federal law).

[233] 602 F.2d 1205 (5th Cir. 1979) (per curiam).

[234] *See* Rizzo v. Goode, 423 U.S. 362, 371 (1976) (unless shown to be personally involved, a mayor is not liable for city employee's actions under § 1983); Watson v. Interstate Cas. Co., 611 F.2d 120, 123 (5th Cir. 1980) (citing Baskin v. Parker, 602 F.2d 1205, 1208 (5th Cir. 1979) (sheriff not vicariously liable under § 1983)); Johnson v. Shaw, 609 F.2d 124, 125-26 (5th Cir. 1980) (per curiam) (citing *Baskin*) (unless shown to be personally involved, state prison warden is not liable for deputies' actions under § 1983); Dailey v. Byrnes, 605 F.2d 858, 860-62 (5th Cir. 1979) (sheriff not vicariously liable under *Baskin*); Cotton v. Hutto, 577 F.2d 453, 455 (8th Cir. 1978) (respondeat superior not available against state prison warden); Landman v. Royster, 354 F. Supp. 1302, 1316 (E.D. Va. 1973) (requirement of superior's personal involvement met when he personally directs subordinate to act, or when superior acquiesces in those acts).

V. RELIEF

Section 1983 states that every person who deprives another person of his constitutional rights "shall be liable." The statute, however, is silent as to the kinds of damages available for such deprivation.[239] Pursuant to section 1988, federal law is only controlling in civil rights suits so far as such laws are suitable "to carry into effect the laws of the United States."[240] When federal law is "not adapted to [that] object, or [is] deficient," then state law is applied. In *Carey v. Piphus*,[241] the Supreme Court articulated a standard for determining when state tort rules of damages are applied. "When interests protected by the common law of torts closely parallel constitutional rights,"[242] then state law governs. When the common law and constitutional interests are not parallel, however, then the common law rules of damages must be carefully adapted to ensure adequate compensation.[243] Thus, both federal and state rules of damages are utilized to ensure that compensation is tailored to the particular deprivation.[244]

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[235] *See, e.g.*, Taylor v. Gibson, 529 F.2d 709, 716 (5th Cir. 1976) (sheriff liable under respondeat superior for deputies' actions under § 1983 in certain circumstances); Carter v. Estelle, 519 F.2d 1136, 1136 (5th Cir. 1975) (per curiam) (prison administrators may under certain circumstances be held liable for the acts of their subordinates); Tuley v. Heyd, 482 F.2d 590, 594 (5th Cir. 1973) (sheriff's vicarious liability under § 1983 is controlled by state law); Madison v. Gerstein, 440 F.2d 338, 341 (5th Cir. 1971) (sheriff liable under respondeat superior for deputies' actions under § 1983 in certain circumstances); Lewis v. Bratigam, 227 F.2d 124, 128 (5th Cir. 1955) (under state law the acts of the deputy may be imputed to the sheriff).

[236] 436 U.S. 658 (1978).

[237] *Id.* at 691.

[238] 602 F.2d at 1208. *But see* Johnson v. Duffy, 588 F.2d 740, 744 (9th Cir. 1978) (if a public official is vicariously liable for the acts of his subordinates under state law, he can be vicariously liable under § 1983).

[239] *See* note 167 *supra*; Carey v. Piphus, 435 U.S. 247, 254 (1979) (basic purpose of § 1983 is to compensate persons for injuries caused by deprivation of constitutional rights); Basista v. Weir, 340 F.2d 74, 85 (3d Cir. 1965) (§ 1983 silent as to damages).

[240] 42 U.S.C. § 1988 (1976).

[241] 435 U.S. 247 (1978).

[242] *Id.* at 258. In this case, students who were suspended from public schools had to show actual proof of damages to recover for violation of procedural due process. *Id.*

To justify a damage award, the plaintiff must prove that the defendant had knowledge of or participated in unconstitutional conduct.[245] Proof of damages may depend on the nature of the interest protected.[246] Although nominal, compensatory and punitive damages may be recovered,[247] the courts are more reluctant to award punitive damages. Therefore, malicious conduct or gross disregard of constitutional rights is required.[248]

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[243] *Id.*

[244] *Id.* at 258-59; *see* Cruz v. Beto, 603 F.2d 1178, 1186 (5th Cir. 1979) (recovery limited to abuse of discretion).

[245] Thomas v. Estelle, 603 F.2d 488, 490 (5th Cir. 1979); *see* notes 165 through 238 and accompanying text *supra.*

[246] *See* Carey v. Piphus, 435 U.S. 247, 248, 253-54 (1978) (unless plaintiffs prove they were actually injured, they are only entitled to nominal damages for deprivation of procedural due process); Simineo v. School Dist., 594 F.2d 1353, 1357 (10th Cir. 1979) (per curiam) (compensatory and punitive damages awarded for school teacher's denial of automatic salary increase, termination without procedural due process and termination for exercising first amendment rights); Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1068 (9th Cir. 1978) (affirming an award of punitive damages for sex discrimination); Landman v. Royster, 354 F. Supp. 1302, 1318 (E.D. Va. 1973) (compensatory damages awarded for cruel and unusual punishment).

[247] *See, e.g.,* Carey v. Piphus, 435 U.S. 247, 248, 253-54 (1978) (nominal and compensatory damages allowable under § 1983); Simineo v. School Dist., 594 F.2d 1353, 1357 (10th Cir. 1979) (per curiam) (compensatory and punitive damages allowable under § 1983); Bradshaw v. Zoological Soc'y, 569 F.2d 1066, 1068 (9th Cir. 1978) (punitive damages allowable under § 1983); *cf.* Johnson v. Railway Express, 421 U.S. 454, 460 (1975) (punitive damages may be awarded under 42 U.S.C. § 1981 (1976)).

[248] *See, e.g.,* Adickes v. S.H. Kress & Co., 398 U.S. 144, 233 (1970) (Brennan, J., concurring in part, dissenting in part) (punitive damages may be recovered upon showing that: (1) defendant acted under color of state law with actual knowledge that he was violating a constitutional right; or (2) defendant acted with reckless disregard of plaintiff's constitutional rights); Carter v. Estelle, 519 F.2d 1136, 1137 (5th Cir. 1975) (per curiam) (prisoner may be awarded compensatory and punitive damages for wrongful confiscation or loss of his property by prison officials); Sostre v. McGinnis, 442 F.2d 178, 204-05 (2d Cir. 1971) (punitive damages may be awarded for unjustifiable violations of constitutional rights), *cert. denied,* 404 U.S. 1049 (1972); United States *ex rel.* Motley v. Rundle, 340 F. Supp. 807, 811 (E.D. Pa. 1972) (punitive damages awarded only upon a showing of malicious action in gross disregard of plaintiff's rights); *cf.* Milner Hotels v. Brent, 207 Miss. 892, 899, 43 So. 2d 654, 655 (1950) (punitive damages awarded if the wrongful act was: (1) intentionally done; and (2) in gross disregard of plaintiff's rights).

Examples of damage awards in the prison context demonstrate that transforming a constitutional deprivation into a monetary award may be difficult. In *Cruz v. Beto*,[249] for interference with attorney-client relationships, the court awarded $9,291.00 to twelve inmates for humiliation and deprivation. The attorney in *Cruz* was awarded $1,000 for humiliation, embarassment, and improper deprivation of her constitutional rights.[250] In *Landman v. Royster*,[251] a Virginia federal district court compensated the plaintiff for wrongful detention in solitary confinement in the amount of $15,303.20.[252] The award was based on pain and suffering, reasonable costs for medical treatment, and lost prison wages.[253] The inmate also requested damages for wages he could have earned had he been released on parole.[254] The court, however, found potential "outside" wages too difficult to assess.[255]

As a matter of policy, federal courts are hesitant to enjoin prison administration and discipline since they are ill-equipped to oversee them.[256] In *Hutto v. Finney*,[257] the district court of

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In Fielder v. Bosshard, 590 F.2d 105 (5th Cir. 1979), the court found that in suits alleging cruel and unusual punishment, punitive damages are necessarily justified since "the jury must find egregious conduct capable of supporting an award of punitive damages" in order to find cruel and unusual punishment. *Id.* at 111. *Compare* Campise v. Hamilton, 382 F. Supp. 172, 186 (S.D. Tex. 1974) (showing of actual damages not necessary to recover punitive damages), *appeal dismissed*, 541 F.2d 279 (5th Cir. 1976), *cert. denied*, 429 U.S. 1102 (1977) *with* Ross v. Deposit Guar. Nat'l Bank, 400 F. Supp. 45, 52 (S.D. Miss. 1974) (no punitive damages without proof of actual damages) *and* McCain v. Cochran, 153 Miss. 237, 275, 120 So. 823, 828 (1929) (same).

[249] 603 F.2d 1178 (5th Cir. 1979).

[250] *Id.* at 1186; *see* Baskin v. Parker, 602 F.2d 1205, 1209-10 (5th Cir. 1979) (per curiam)(remanded for consideration of damages for personal humiliation, embarrassment and mental distress due to illegal arrest).

[251] 354 F. Supp. 1302 (E.D. Va. 1973).

[252] *Id.* at 1319.

[253] *Id.* For other cases awarding damages for lost prison wages, see Neal v. Wolfe, 346 F. Supp. 569, 576 (E.D. Pa. 1972); Motley v. Rundle, 340 F. Supp. 807, 810 (E.D. Pa. 1972).

[254] 354 F. Supp. at 1319.

[255] *Id.*

[256] *See* Bell v. Wolfish, 441 U.S. 520, 547 n.29 (1979) (courts should afford jail administrators wide deference in prescribing discipline since courts are ill-equipped to deal with these matters); Jones v. North Carolina Prisoners' Labor Union, 433 U.S. 119, 128 (1977) (courts should afford prison officials wide deference in administration); McGruder v. Phelps, 608 F.2d 1023, 1026 (5th Cir. 1979) (prison officials must have broad discretion, free from judicial interference, in classifying prisoners' custodial status); Cruz v. Beto, 603 F.2d 1178, 1185 (5th Cir. 1979) (prison officials have broad discretion in gov-

Arkansas held four hearings over a period of several years before ordering the Arkansas Department of Corrections to make specific improvements.[258] The first *Gates v. Collier*[259] decision marked the beginning of massive federal intervention in state prisons. Since that time, federal courts have issued injunctions ordering state prison systems to compile and publish disciplinary regulations,[260] close delapidated housing facilities,[261] close the prison to incoming prisoners until overcrowding is reduced,[262] classify and separate dangerous prisoners,[263] provide access to the courts,[264] and comply with detailed mail regulations.[265]

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erning prisoners which may include banning of disruptive attorneys and classifying of prisoners); Preston v. Thompson, 589 F.2d 300, 303 (7th Cir. 1978) (courts should be hesitant to enjoin prison officials unless prisoners' constitutional rights are being violated); Auld v. Foster, 485 F.2d 945, 946 (5th Cir. 1973) (same).

In *Wolfish*, the Court noted that although previous cases dealt with convicted inmates, the principle of deference also applies to pretrial detainees. 441 U.S. at 547 n.29.

[257] 437 U.S. 678 (1978).

[258] *Id.* at 648.

[259] 349 F. Supp. 881, 898-905 (N.D. Miss. 1972), *aff'd in part and modified in part,* 501 F.2d 1291, 1303-04 (5th Cir. 1974).

[260] Gates v. Collier, 606 F.2d 115, 115 (5th Cir. 1979).

[261] Inmates of Henry County Jail v. Parham, 430 F. Supp. 304, 307 (N.D. Ga. 1976) (county jail closed for unconstitutional conditions).

[262] Pugh v. Lock, 406 F. Supp. 318, 322 (M.D. Ala. 1976), *aff'd sub nom.* Newman v. Alabama, 559 F.2d 283 (5th Cir. 1977), *cert. denied,* 438 U.S. 915 (1978); *cf.* Costello v. Wainwright, 397 F. Supp. 20, 34 (M.D. Fla. 1975) (ordered prison population reduced in stages), *aff'd,* 525 F.2d 1239 (5th Cir. 1976).

[263] *See, e.g.,* McCray v. Sullivan, 509 F.2d 1332, 1334 (5th Cir. 1975) (prison officials may be required to protect prisoners from other dangerous prisoners), *cert. denied,* 423 U.S. 859 (1975); Gates v. Collier, 501 F.2d 1291, 1308-10 (5th Cir. 1974) (inmates should be assigned to barracks according to the severity of their offense); Young v. Wainwright, 449 F.2d 338, 339 (5th Cir. 1971) (except in extreme circumstances, courts are reluctant to require classification and segregation of prisoners); Holt v. Sarvers, 309 F. Supp. 362, 384 (E.D. Ark. 1970) (prison official ordered to exercise more care in assigning men to barracks), *aff'd,* 442 F.2d 304 (8th Cir. 1971).

[264] *See* notes 60 through 96 and accompanying text *supra.*

[265] *See* Wolff v. McDonnell, 418 U.S. 529, 576-77 (1974) (mail censorship must be accompanied by minimum procedural safeguards); Procunier v. Martinez, 416 U.S. 396, 417 (1974) (same); Guajardo v. Estelle, 580 F.2d 748, 753-63 (5th Cir. 1978) (same); McCray v. Sullivan, 509 F.2d 1332, 1336 (5th Cir. 1975) (case remanded to be determined in light of *Wolff* and *Martinez*).

VI. County Jails and Pretrial Detainees

As demonstrated above, a state's potential liability for unconstitutional prison conditions is considerable; however, a county's potential liability is even greater. The Supreme Court in *Monell v. Department of Social Services*[266] held that local governmental units are "persons" within the meaning of section 1983[267] and may therefore be liable for constitutional deprivations caused pursuant to an official governmental policy.[268] According to the Court, this policy need not be formally approved if it is a "custom or usage" of the governing body.[269] The Court also held that absent a formal policy or a "custom or usage," local governments are not liable for the constitutional torts of their employees solely on the basis of respondeat superior.[270]

Although *Monell* did not determine the scope of local governments' immunity, the Court addressed that issue two years later in *Owen v. City of Independence*.[271] In this case, the city asserted its officials' good faith as a defense under section 1983.[272] The Court announced that immunity under section 1983 is allowed only where strong public policy supports it, or where the immunity was firmly rooted in the common law prior to the enactment of section 1983.[273] Since the good faith defense did not fall within either exception,[274] the Court held that municipalities have no immunity from liability resulting from its officers' unconstitutional conduct.[275]

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[266] 436 U.S. 658 (1978).

[267] *Id.* at 663. By rereading the legislative history of § 1983, the Court in *Monell* overruled that part of Monroe v. Pape, 365 U.S. 167, 181 (1961), which held that cities were not "persons" and were therefore wholly immune from suit under § 1983. 436 U.S. at 663-90. For a thorough discussion of the meaning of "person", see Annot., 56 L. Ed. 2d 895, 897-915 (1978).

[268] 436 U.S. at 691-92.

[269] *Id.*; *see* Rizzo v. Goode, 423 U.S. 362, 371 (1976) (must be affirmative link between misconduct and official policy); Adickes v. S.H. Kress & Co., 398 U.S. 144, 167-73 (1970) (informal practices amounting to custom or usage has the force of law); Nashville C. & St. L. Ry. v. Browning, 310 U.S. 362, 367 (1940) (practice must have been continous and pervasive).

[270] 436 U.S. at 663 n.7, 692; *see* Heath v. Redbud Hosp. Dist., 620 F.2d 207, 209 (9th Cir. 1980) (*Monell* precludes liability based exclusively upon respondeat superior); Reeves v. City of Jackson, 508 F.2d 644, 654 (5th Cir. 1979) (city not liable solely on the basis of respondeat superior); Baskin v. Parker, 602 F.2d 1205, 1206 (5th Cir. 1979) (municipal employee's actions must be taken pursuant to official policy). For a more detailed discussion of respondeat superior under § 1983, see notes 233 through 238 and accompanying text *supra*.

[271] 445 U.S. 622 (1980). For a thorough treatment of *Owen*, see pages 139 through 153 *infra*.

[272] 445 U.S. at 624-25.

Potential liability of local officials has been exacerbated even further by the fact that they must deal with three classes of prisoners: (1) state prisoners awaiting transfer to Parchman who are protected by the eighth amendment and to whom *Gates* orders could be extended; (2) local prisoners serving misdemeanor sentences who are protected by the eighth amendment and state statutes;[276] and (3) pretrial detainees who are still protected by the fourteenth amendment.[277]

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[273] *Id.* at 638.

[274] *Id.* at 638-56.

[275] *Id.* at 657.

[276] *See, e.g.,* Dailey v. Byrnes, 605 F.2d 858, 861 (5th Cir. 1979) (liability for cruel and unusual punishment must rest on a showing of callous, deliberate indifference); Taylor v. Sterrett, 600 F.2d 1135, 1141 (5th Cir. 1979) (court ordered wide-ranging relief of county jail conditions for violations of state law); Fielder v. Bosshard, 590 F.2d 105, 107-09 (5th Cir. 1979) (citing Estelle v. Gamble, 428 U.S. 97 (1976)) (sheriff's liability for cruel and unusual punishment rests upon a showing of callous indifference to serious needs); Robinson v. Jordan, 494 F.2d 793, 795 (5th Cir. 1974) (per curiam) (doctor held liable under his statutory duty to provide medical care to county prisoners when his gross misconduct caused severe permanent bodily injury); Roberts v. Williams, 456 F.2d 819, 827 (5th Cir. 1972) (county prisoner must establish conscious purpose to inflict suffering or callous indifference to show eighth amendment violation). For examples of Mississippi statutes protecting prisoners, see MISS. CODE ANN. § 19-25-35 (1972) (sheriff's duty to keep safely prisoners in his custody); *id.*-69 (sheriff must keep jail in clean and comfortable condition; if he willfully neglects or refuses, the governor is empowered to remove the sheriff); *id.* -71 (jailer to maintain separate facilities for sexes, provide daily wholesome and sufficient food, adequate lighting and clean bedding); *id.* -73 to -74 (Supp. 1979) (provides alternative methods for funding feeding of prisoners and keeping a log of meals served); *id.* § 47-1-27 (1972) (official guard, or employee of sheriff who mistreats or abuses convict or permits it to be done, or who willfully fails to provide sufficient and wholesome food, clothing, shelter, bathing facilities, or medical attention to inmate, shall be guilty of a misdemeanor); *id.* -29 (complaints by convicts are to be investigated by the county board of supervisors); *id.* -57 (inmate in need of medical attention shall be immediately examined by the sheriff who shall call a doctor if he deems it necessary); *id.* -59 (expenses of guarding inmates while in hospital paid from general county funds); *id.* § 19-5-1 (county board of supervisors has duty to inspect jail at least once every three months in regard to safety, sufficiency, and accommodation of prisoners; board has power to fine sheriff for neglect of his duties); *id.* 19-3-41 (board of supervisors required to erect and maintain jail in good repair); *id.* 19-25-19 (all sheriffs shall be liable for acts of deputies).

[277] *See* Bell v. Wolfish, 441 U.S. 520, 536-37 (1979) (pretrial detainees cannot be

In 1979 the Supreme Court decided *Bell v. Wolfish,*[278] a class action challenging conditions of confinement in a federally operated short-term detention center for pretrial detainees.[279] In this case, the defendants contended that the plaintiffs lacked standing since all of them had been transferred or released from the facility by the time the case was heard.[280] The Court held that a case or controversy existed at the time the case was filed and when the class was certified.[281] Thus, the class consisting of both present and future inmates had standing to sue even though the class representatives' claim had been terminated since unnamed members of the class could still be subjected to the contested conditions.[282] Further, the violations at issue were "capable of repetition, yet evading review" because of the temporary nature of the confinement.[283] Therefore, the case remained viable.[284]

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subjected to conditions constituting punishment without due process); Jones v. Diamond, 594 F.2d 997, 1003 (5th Cir.) (confinement conditions of pretrial detainees may be analyzed as due process deprivation rather than as cruel and unusual punishment), *rehearing granted,* 602 F.2d 1254 (5th Cir. 1979); McMahon v. Beard, 583 F.2d 172, 174-75 (5th Cir. 1978) (solitary confinement in "strip cell" when prisoner is charged with murder not violative of constitutional rights); Miller v. Carson, 563 F.2d 741, 744-45 (5th Cir. 1977) (pretrial detainees should not be subjected to any hardships other than those absolutely necessary for confinement); Mitchell v. Untreiner, 421 F. Supp. 886, 893 (N.D. Fla. 1976) (pretrial detainee retains all rights of an ordinary citizen except those expressly or impliedly taken from him by law).

[278] 441 U.S. 520 (1979).

[279] *Id.* at 523. The New York Metropolitan Corrections Center was described by the Court as most advanced and innovative. *Id.* at 525. The plaintiffs challenged overcrowding, inadequate recreation, strip searches and other improper searches. *Id.* at 527.

[280] *Id.* at 526 n.5.

[281] *Id.*

[282] *Id.* Even though the suit might become moot as to the named plaintiff, the constitutional issue can still be decided if the plaintiff certifies himself as a representative of a class. To do this, the plaintiff must have a case and controversy when the complaint is filed, and when the class is certified. Sosna v. Iowa, 419 U.S. 393, 402 (1975). Then if the named plaintiff's claim becomes moot, the controversy will continue between the named defendants and the members of the class.

[283] *See* Sosna v. Iowa, 419 U.S. 393, 399-400 (1975) (controversy not moot where question presented is capable of repetition, yet evading review); United States v. W.T. Grant Co., 345 U.S. 629, 632-33 (1953) (the public interest in having the legality of practices settled militates against a mootness conclusion); Satterwhite v. City of Greenville, 578 F.2d 987, 995 (5th Cir. 1978) (application of the mootness doctrine in class action context depends on the idiosyncrasies of each case).

[284] 441 U.S. at 526 n.5.

Similar mootness problems appeared in *Jones v. Diamond*.[285] The district court denied the plaintiff relief and the appeal of Jones' personal claims was denied as untimely. However, the appeal of the class claims was timely.[286] Although Jones' personal claims were moot, the Fifth Circuit allowed him to represent the class on appeal since he retained "a sufficient homogeneity of interest at every moment of the litigation."[287]

The Supreme Court in *Wolfish* also announced guidelines for determining whether pretrial detainees' constitutional rights have been violated. The Second Circuit had reasoned that since pretrial detainees were "presumed innocent" they retained the rights of unincarcerated persons.[288] Thus, the court required that pretrial detainees only be subjected to restrictions inherent in their confinement or to restrictions based on a compelling necessity of jail administration.[289] The Supreme Court, however, held that the "presumption of innocence" defines the burden of proof in criminal cases and is not a source for the compelling necessity test used by the court below.[290] To determine whether a pretrial detainee's rights have been violated, the Court stated that the proper inquiry is whether the conditions amount to punishment[291] on the basis of the following test:

> Whether the sanction involves an affirmative disability of restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of scienter, whether its operation will promote the traditional aims of punishment—retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for

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[285] 594 F.2d 997 (5th Cir.), *rehearing granted,* 602 F.2d 1243 (5th Cir. 1979).

[286] 594 F.2d at 1004-05.

[287] *Id.* at 1005.

[288] 441 U.S. at 531.

[289] *Id.*; *see* Miller v. Carson, 563 F.2d 741, 747 (5th Cir. 1977) (pretrial detainees are not to be subjected to any hardships except those necessary for the purpose of confinement only); Mitchell v. Untreiner, 421 F. Supp. 886, 893 (N.D. Fla. 1976) (pretrial detainees retain all rights accorded arrestees released on bail, except for curtailment of mobility to secure presence at trial and to protect jail security).

[290] 441 U.S. at 532-33.

[291] *Id.* at 535 n.16; *see* McMahon v. Beard, 583 F.2d 172, 174 (5th Cir. 1978) (punitive measures imposed on prisoners are not to be imposed on pretrial detainees).

> it, and whether it appears excessive in relation to the alternative purpose assigned. . . .[292]

Thus, pretrial detainees do not possess the same freedoms as the unincarcerated. Some valid objectives justifying imposition of restrictions include: ensuring presence at trial, effective management of a facility, jail security, and preservation of internal order and discipline.[293] Furthermore, the Court warned that courts ordinarily should defer to the expertise of correctional officials in determining whether restrictions are reasonably related to legitimate governmental objectives.[294]

In dissent, Justice Marshall argued that the majority's test coupled with deference to prison officials would allow officials to impose almost any restrictions.[295] More fundamentally, Justice Marshall reasoned that the proper inquiry should be whether the governmental interest outweighs the individual deprivation as in other due process cases, not whether the practice constitutes "punishment."[296]

Judge Rubin's dissent in *Jones* echoed Justice Marshall's response in *Wolfish,* stating that the language of section 1983 does not restrict its protection to intentional invasions.[297] The majority in *Jones* held that the plaintiff must show that prison authorities acted with "deliberate and callous indifference," a higher standard than that of simple negligence.[298] Judge Rubin believed the court thus refused to differentiate between the standards applicable to pretrial detainees and convicted persons, or between the nature of the conduct required to establish liability and the degree of culpability required to justify a damage award.[299]

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[292] 441 U.S. at 527-38 (quoting Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963)). After quoting *Kennedy*, the Court explained that absent a showing of an official's express intent to punish, the question of whether a practice is punishment turns on whether the purpose of the restriction is punitive or whether the restriction is incidental to a legitimate governmental purpose. 441 U.S. at 539.

[293] 441 U.S. at 540.

[294] *Id.* at 540 n.23.

[295] *Id.* at 563 (Marshall, J., dissenting).

[296] *Id.* at 563-64 (Marshall, J., dissenting).

[297] 594 F.2d at 1035 (Rubin, J., concurring in part and dissenting in part).

[298] *Id.* at 1003-04.

[299] *Id.* at 1035 (Rubin, J., concurring in part and dissenting in part).

VII. CONCLUSION

The plaintiffs in *Jones* attacked every facet of the Jackson County Jail.[300] The panel reviewed the standards applicable to every area of county jail operation, although it granted relief in only limited circumstances.[301] The court indicated that state prison standards are applicable to county jails through the state prisoners housed there; however, it refused to require Jackson County officials to comply with all requirements since "[i]t is the State which is responsible for the backlog of convicted criminals in the county jail. The convicts are state prisoners, not county prisoners."[302] Further action against appropriate state officials to exact compliance was not precluded.[303]

State and local authorities are primarily responsible for curing constitutional violations.[304] But frequently those authorities must be compelled to act by the courts. Federal courts have expressed a reluctance to intervene in the operations of state and local jails.[305] State courts, therefore, are the logical avenue for enforcement of constitutional rights on a local level. The United States Supreme Court has recognized repeatedly that state courts have the duty to enforce federally created rights.[306] Thus, state courts have concurrent jurisdiction over section 1983 claims.[307] Of equal importance, they are the sole forum for the enforcement of duties arising under state law,[308] and they provide a hope for potential recovery under the doctrine of respondeat superior, which is no longer available under section 1983.[309]

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[300] *Id.* at 1003-04. They attacked: (1) lack of recreation, (2) overcrowding, (3) lack of adequate medical care, (4) visitation rules, (5) utilization of trustees, (6) racial segregation, (7) lack of an adequate diet, (8) communicative censorship, (9) lack of fair disciplinary proceedings, (10) classification system, (11) inmate security procedures, (12) physical facilities, and (13) lack of access to the courts. *Id.* at 1005-06. The final order enjoined racial segregation, limited the number of convicts to be housed in a new jail, ordered the defendants to submit a plan for noncontact visitation, and vacated an order requiring the defendants to post a list of "prisoner's rights." *Id.* at 1029-30.

[301] *Id.* at 1011-22.

[302] *Id.* at 1024-25. The court rejected the prisoners' claim that Bounds v. Smith, 430 U.S. 817 (1977), holding that the constitutional right of access to the courts required state prison authorities to provide prisoners with adequate law libraries or with assistance from persons trained in law, was applicable to county jails. 594 F.2d at 1024.

[303] 594 F.2d at 1025.

[304] *See* Milliken v. Bradley, 433 U.S. 267, 281 (1977) (local school authorities have responsibility for solving constitutional violations); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) (same).

[305] *See* note 5 and accompanying text *supra.*

[306] *See, e.g.,* Martinez v. California, 100 S. Ct. 553, 558 n.7. (1980) (if Congress provides no remedy for federally created action, an aggrieved party may still enforce the action in state court); Testa v. Katt, 330 U.S. 386, 389-91 (1947) (states have obligation to enforce federal laws); Mondon v. New York, N.H. & H.R.R., 223 U.S. 1, 55-58 (1912)

County jails are indeed a matter of local concern. Whether compliance is voluntary or exacted by court order, local taxpayers are ultimately strapped with the cost of providing constitutionally minimum facilities. It is hoped that *Jones* will establish uniform guidelines for county jails throughout the Fifth Circuit. Therefore, local authorities should be encouraged to spare taxpayers the additional expense of litigation and to comply voluntarily with constitutional mandates and state law.

Mary Elizabeth Hall
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(rights arising under a congressional act may be enforced by state courts); Chaflin v. Houseman, 93 U.S. 130, 136-37 (1876) (state courts have concurrent jurisdiction where exclusive federal jurisdiction is neither express nor implied); Lewis v. Delta Loans, Inc., 300 So. 2d 142, 144-45 (Miss. 1974) (state and federal courts may exercise concurrent jurisdiction over rights created under federal law); Masonite Corp. v. International Woodworkers of Am., 215 So. 2d 691, 695 (Miss. 1968) (state has concurrent jurisdiction over Labor Management Relations Act), *cert. denied*, 394 U.S. 974 (1969); Keohring Co. v. Hyde Constr. Co., 254 Miss. 214, 229, 178 So. 2d 838, 842-43 (1965) (where state courts have long enjoyed jurisdiction over subject matter of an action, jurisdiction is not withdrawn by federal statute unless such intention is distinctly manifest).

[307] *See, e.g.*, Martinez v. California, 100 S. Ct. 553, 558 n.7 (1980) (state court may entertain § 1983 action where some type of claim would be enforced in the state's courts); Long v. District of Columbia, 469 F.2d 927, 937 n.4 (D.C. Cir. 1972) (Congress has generally chosen to grant concurrent jurisdiction in private civil actions and if a federal statute contains no express provision to the contrary, concurrent jurisdiction may be presumed); Hofferber v. First Nat'l Bank, 437 F. Supp. 788, 791 (W.D. Okla. 1977) (concurrent jurisdiction under Civil Rights Act); Young v. Board of Educ., 416 F. Supp. 1139, 1140-41 (D. Colo. 1976) (same); Alvarez v. Wiley, 71 Cal. App. 3d 599, 139 Cal. Rptr. 550, 553-54 (1977) (same); Holt v. City of Troy, 78 Misc. 2d 9, 355 N.Y.S.2d 94-96 (1974) (same); Kish v. Wright, 562 P.2d 625, 626-27 (Utah 1977) (same).

[308] *See* note 279 *supra*.

[309] For example, the Mississippi statute, MISS. CODE ANN. § 19-25-19 (1972), provides in pertinent part: "all sheriffs shall be liable for the acts of their deputies, and for money collected by them." *Accord*, Poole v. Maryland Cas. Co., 380 So. 2d 238, 239 (Miss. 1980) (plaintiff obtained judgment against sheriff for injuries resulting from an accident with sheriff's deputy).

*Editor's note: Since the time this Comment was prepared for publication, the Fifth Circuit en banc heard *Jones v. Diamond* and the United States Supreme Court granted the petition for writ of certiorari. Jones v. Diamond, 636 F.2d 1364 (5th Cir. 1981), *cert.*

granted sub nom. Ledbetter v. Jones, 49 U.S.L.W. 3946 (June 23, 1981) (No. 80-1804). In addition the Supreme Court held in Rhodes v. Chapman, 49 U.S.L.W. 4677 (June 16, 1981), that placing two inmates in a cell designed for one does not violate the prohibition against cruel and unusual punishment under the 8th and 14th amendments, if it does not constitute wanton or necessary infliction of pain, nor subject an inmate to conditions grossly disproportionate to the severity of the crime.

CONVERGENCE OF THE COPYRIGHT LAW AND THE SHERMAN ACT

Because of the broad scope of trade regulation under the federal antitrust laws,[1] conflicts between the policy or substance of the antitrust laws and other areas of federal law are not uncommon. The patent and copyright laws are particular areas of federal law that contain a potential for conflict with the antitrust laws. When the grant of monopoly rights under both the patent and copyright laws[2] is contrasted with the underlying antitrust policy of suppressing anticompetitive activity,[3] this potential for conflict becomes readily apparent. Of all federal antitrust laws, the Sherman Act[4] is most frequently the source of conflict with the copyright and patent laws. Accordingly, the antitrust aspects of this comment will be limited to the Sherman Act. Although analogies will be drawn between the patent and copyright laws in relation to the Sherman Act, an extensive discussion of the relationship between the patent laws and the antitrust laws is beyond the scope of this comment.[5]

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[1] The federal antitrust laws consist of the following statutes: Sherman Act, 15 U.S.C. §§ 1-7 (1976); Clayton Act, *id.* §§ 12-27; Robinson-Patman Act, *id.* §§ 13-13b, 21a; Federal Trade Commission Act, *id.* §§ 41-58. Section 1 of the Clayton Act defines the Sherman, Clayton, and Robinson-Patman Acts to be "antitrust laws;" however, the Federal Trade Commission Act is not an "antitrust law" as defined by that section. *Id.* § 12. See notes 24 and 25 *infra* for the text of §§ 1 and 2, respectively, of the Sherman Act.

[2] The owner of a patent has the right to "exclude others from making, using, or selling the invention throughout the United States." 35 U.S.C. § 154 (1976). Likewise, the copyright owner has the exclusive right to reproduce, publish, perform, and display the copyrighted article. 17 U.S.C. § 106 (1976).

[3] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958) (Sherman Act aimed at preserving free competition).

[4] 15 U.S.C. §§ 1-7 (1976).

[5] Much has been written on the relationship between patent and antitrust laws. *See generally* O. BARNETT, PATENT PROPERTY AND THE ANTI-MONOPOLY LAWS (1943); W. BOWMAN, PATENT AND ANTI-TRUST LAW (1973); Keating, *The Patent Monopoly versus Anti-Trust Activism—Open Warfare or Armed Truce?*, 77 DICK. L. REV. 1 (1979); Oppenheim, *Patents and Antitrust: Peaceful Co-existence?*, 54 MICH. L. REV. 199 (1955); Turner, *The Patent System and Competitive Policy*, 44 N.Y.U. L. REV. 450 (1969).

I. THE COPYRIGHT LAW OF THE UNITED STATES

The United States Constitution grants to Congress the power to "promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[6] Congress enacted patent and copyright laws pursuant to this clause.[7] The copyright law affords protection to an author's original works that are fixed in any tangible medium of expression.[8] The protection provided to the owner of the copyright consists of the exclusive rights to reproduce, distribute, display, and prepare derivative works based on the copyrighted article.[9] In addition, when the copyright is on a musical composition, choreographic work, or dramatic work, the copyright owner has the exclusive right to perform the work publicly for a profit.[10] Thus, the copyright owner has a legal monopoly with respect to the particular copyrighted work. However, the monopoly grant is limited by the copyright law in several respects.[11] For example, the duration of the exclusive rights is limited by statute.[12] Thus, the monopoly grant is not a pure monopoly in the classic economic sense. The Copyright Act provides that any exclusive rights embodied in a copyright or any subdivision of the exclusive rights may be transferred and separately owned.[13] Upon transfer, the transferee is entitled to the same protection and remedies as the original copyright owner.[14] A license, however, is distinguished from an assignment of complete ownership of the copyright.[15] In the latter, the ownership of the copyright is vested in the assignee, while in the former, the licensee merely acquires a right to use the copyright in a manner designated in the license agreement.[16]

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[6] U.S. CONST. art. 1, § 8, cl. 8. For a discussion of the background of copyright protection in the United States, see B. BUGBEE, THE GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW (1967); LIBRARY OF CONGRESS, COPYRIGHT IN CONGRESS 1789-1904 (Solberg ed. 1905).

[7] The present Patent Code may be found at 35 U.S.C. §§ 1-375 (1976 & Supp. III 1979). The present Copyright Code may be found at 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979). The latter was a major revision of the Copyright Act, the first since 1909. Pub. L. No. 95-553, 90 Stat. 2541 (codified at 17 U.S.C. §§ 101-810 (1976 & Supp. III 1979)). *See generally Copyright Symposium* (pts.1-2), 22 N.Y.L.S. L. REV. 193-292 (1976) and 471-678 (1977) (review of new Copyright Act).

[8] 17 U.S.C. § 102(a) (1976). The tangible medium of expression may be "now known or later developed." *Id.* If the work is fixed to the medium of expression so that the work may be "perceived, reproduced, or otherwise communicated," either directly or with the aid of a machine or device, it is entitled to copyright protection. *Id.* The statute lists several types of works to which copyright protection extends. These include: literature, music and dramatic works; pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and audiovisual works; and sound recordings. *Id.* However, the ideas, concepts, or principles embodied in the work of authorship are not protected by the copyright. *Id.* § 102(b). *See* H. HOWELL, THE COPYRIGHT LAW 10-44 (1948) (copyrightable material).

[9] 17 U.S.C. § 106 (1976).

[10] *Id.* For a discussion of common law rights in unpublished works, see E. DRONE, LAW OF COPYRIGHT 97-136 (1879).

[11] 17 U.S.C. §§ 107-118 (1976). Limitations on exclusive rights include: fair use, *id.* § 107; reproduction by libraries and archives, *id.* § 108; sale or display of particular copies by the owner, *id.* § 109; performance or display for educational, religious, or non-

The Copyright Act refers to both exclusive and nonexclusive licenses.[17] When an exclusive license is granted, the licensee is

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profit purposes, *id.* § 110; certain secondary transmissions, *id.* § 111; ephemeral recordings, *id.* § 112; the making, distribution, or display of pictures or photographs of pictorial, graphic, and sculptural works, *id.* § 113.

[12] Prior to the enactment of the 1976 Copyright Act, a copyright secured under the federal copyright law had a duration of 28 years from the date of first publication and a renewal right for a further term of 28 years. Copyright Act, ch. 391, § 24, 61 Stat. 659 (1947) (repealed 1976). Generally, under the new copyright act, the copyright of a work created after January 1, 1978 (effective date of the 1976 Act) has a duration of a term equal to the life of the author plus 50 years from the time of the author's death. 17 U.S.C. § 302(a)(1976). For the duration of copyrights on works created before January 1, 1978, and copyrights existing on that date, see *id.* §§ 303, 304. *See generally* N.Y. PRACTICING LAW INSTITUTE, PRACTICING UNDER THE COPYRIGHT LAW OF 1976 (1978); *Copyright Symposium, supra* note 7 (reviewing the new Act).

[13] 17 U.S.C. § 201(d)(2) (1976). The Act defines transfer of copyright ownership as "an assignment, mortgage, exclusive license, . . . of a copyright or of any of the exclusive rights comprised in a copyright, whether or not it is limited in time or place of effect, but not including a non-exclusive license." *Id.* § 101; *see* H. BALL, LAW OF COPYRIGHT AND LITERARY PROPERTY §§ 6-19, at 38-63 (1944) (nature of copyright).

[14] 17 U.S.C. § 201(d)(2) (1976).

[15] *Id.* § 101, 201; *see* note 13 *supra.*

[16] *See* First Fin. Marketing Servs. Group, Inc. v. Field Promotions, Inc., 286 F. Supp. 295, 298 (S.D.N.Y. 1968) (legal title to copyright may be conveyed only in its entirety); L. AMDUR, COPYRIGHT LAW AND PRACTICE 784-844 (1936) (assignment and licenses).

[17] A nonexclusive license is not a transfer of copyright ownership. 17 U.S.C. § 101 (1976). However, it will take priority over a subsequent transfer of ownership or a prior unrecorded transfer of ownership of which the nonexclusive licensee did not have notice, if the license is in writing and signed by the owner of the rights so licensed. *Id.* § 205(f). *But see* P. RUCK & E. JAMES, COPYRIGHT 249 (1956) (plaintiff in infringement suit must show infringement of that part of the copyright vested in him). *See also* B. RINGER & P. GITLIN, COPYRIGHTS 54-56 (1965) (discussing transfer and recordation).

considered the copyright owner of the particular exclusive rights granted by the license and no other person may exercise that right.[18] However, restrictions may be placed on the licensee's use of these rights.[19] Restrictions generally concern prices at which the licensee may sell or display the work[20] and limitations on the field or territory in which the copyrighted work may be used.[21] However, the monopoly created under the Copyright Act was not intended to authorize agreements that unlawfully restrain trade.[22]

II. THE SHERMAN ANTITRUST ACT

The Sherman Antitrust Act[23] was enacted by Congress in 1890. Sections 1 and 2 contain its broadly worded substantive provisions. Section 1 provides that every contract, combination, or conspiracy in restraint of trade is illegal.[24] Section 2 provides

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[18] 17 U.S.C. § 101 (1976). This is a definitional section which states that " '[c]opyright owner', with respect to any one of the exclusive rights comprised in a copyright, refers to the owner of that particular right." *Id.; see* P. RUCK & E. JAMES, *supra* note 17, at 181-84 (discussing limitations and conditions of transfer).

[19] *See* 17 U.S.C. § 191 (1976) (exclusive license, although limited in time or place of effect, is a transfer of copyright ownership).

[20] *See, e.g.*, Bobbs-Merrill Co. v. Straus, 210 U.S. 339, 341 (1908) (retail price restrictions invalid where no privity exists between copyright owner and retail seller); Columbia Pictures Corp. v. Coomer, 99 F. Supp. 481, 482 (E.D. Ky. 1951) (upholding minimum admission fees imposed by copyright owner on theater owners).

[21] *See, e.g.*, United States v. Chicago Tribune-New York News Syndicate, Inc., 309 F. Supp. 1301, 1302 (S.D.N.Y. 1970) (territorial restrictions on the sale of newspaper features); Inge v. Twentieth Century-Fox Film, Corp., 143 F. Supp. 294, 296-97 (S.D.N.Y. 1956) (upholding restrictions on when copyrighted film could be released).

[22] Straus v. American Publishers Ass'n, 231 U.S. 222, 234-35 (1913); J. TAUBMAN, COPYRIGHT AND ANTITRUST 47-49 (1960).

[23] 15 U.S.C. §§ 1-7 (1976). When Congress enacted the Sherman Act, it exercised the full extent of its power under the commerce clause of the Constitution. Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 435 (1932). The Supreme Court has recognized that the Sherman Act is as important to the preservation of the free enterprise system as the Bill of Rights is to the preservation of fundamental liberties. United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972). *See generally* H. THORELLI, THE FEDERAL ANTITRUST POLICY 54-160 (1954) (historical and ideological reasons for passage of Sherman Act).

[24] Sherman Act § 1, 15 U.S.C. § 1 (1976) provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal

that every person who monopolizes or attempts to monopolize, or combines or conspires to monopolize trade or commerce is guilty of a felony.[25]

In order for an activity to come within the purview of the Sherman Act, it must affect interstate commerce.[26] This requirement presents little difficulty, however, since the "affecting commerce" requirement has been so liberally interpreted.[27]

A. *Classification of Conduct that Violates Section 1 of the Sherman Act*

Certain types of conduct have been held to be so detrimental to free competition that they are considered per se violations of section 1 of the Sherman Act.[28] Other types of conduct may

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> shall be deemed guilty of a felony, and on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

See generally 1 E. KINTNER, FEDERAL ANTITRUST LAW §§ 4.1-4.18, at 125-242 (1980) (legislative history of the Sherman Act).

[25] Sherman Act § 2, 15 U.S.C. § 2 (1976) provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

[26] *See* Goldfarb v. Virginia State Bar, 421 U.S. 773, 785 (1975) (Sherman Act applies once it is shown that the challenged activity affects commerce, and no specific magnitude of the effect must be proved); Houston, E. & W. Ry. v. United States, 234 U.S. 342, 351-52 (1914) ("affection" doctrine applied to Sherman Act violations).

[27] *See, e.g.*, Hospital Bldg. Co. v. Rex Hosp. Trustees, 425 U.S. 738, 741-44 (1976) (local hospital's purchasing medicine and supplies out of state affects commerce); United States v. Employing Plasterers Ass'n, 347 U.S. 186, 189 (1954) (completely local restraints can produce the effects condemned by the Sherman Act); Lorain Journal Co. v. United States, 342 U.S. 143, 150-52 (1951) (local newspaper affects commerce by distributing news transmitted over national wire service); Wickard v. Filburn, 317 U.S. 111, 120-24 (1924) (wheat produced by farmer affects commerce and is subject to federal regulation). *See also* L. SULLIVAN, ANTITRUST §§ 232-33, at 708-14 (1977) (discussing Sherman Act coverage and coverage of other antitrust laws).

[28] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). The Court stated that per se violations of the antitrust laws are those "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to

be found to be violations if, when examined under the rule of reason, they are found to be unreasonable restraints upon trade.[29]

1. Price Fixing

The horizontal fixing of prices by competitors is a per se violation of the Sherman Act.[30] It is immaterial that the prices fixed are reasonable prices or that the purpose of fixing the prices is to end competition destructive to the competitors or to eliminate price instability harmful to consumers and producers.[31]

Illegal price fixing includes both the setting of minimum prices[32] and agreements fixing maximum prices.[33] Price fixing also encompasses indirect methods of fixing prices such as agreements among buyers to limit purchases.[34]

Vertical price fixing agreements between manufacturers and distributors or retailers are also per se violations of section 1 if a conspiracy, combination, or agreement to fix such prices is

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the precise harm they have caused or the business excuse for their use." *Id.* at 5; *see* M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 89-135 (1973) (critique of Supreme Court's formulation of antitrust doctrines).

[29] Standard Oil Co. v. United States, 221 U.S. 1, 66 (1911) (rule of reason is the guide in construction of Sherman Act); United States v. American Tobacco Co., 221 U.S. 106, 178-84 (1911) (Sherman Act applies to acts which unduly restrain trade). *See generally* Bork, *The Rule of Reason and the Per se Concept: Price Fixing and Market Division*, 75 YALE L.J. 373, 403 (1966) (economic analysis of vertical market division).

[30] United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (conspiracy among oil producers to fix prices by purchasing excess oil); United States v. Trenton Potteries Co., 273 U.S. 392, 398 (1927) (price fixing illegal regardless of reasonableness of prices fixed).

[31] *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (prevention of adverse effects of competition not a defense).

[32] *See, e.g.*, Goldfarb v. Virginia State Bar, 421 U.S. 773, 775-79 (1975) (lawyers' title searches); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 166-70 (1940) (agreements designed to prevent surpluses from lowering prices).

[33] Albrecht v. Herald Co., 390 U.S. 145, 149-52 (1968) (conspiracy to fix maximum resale prices of newspapers per se violation); Kiefer-Stewart Co. v. Seagram & Sons, 340 U.S. 211, 213 (1951) (conspiracy to fix maximum resale prices between parent and subsidiary held illegal per se).

[34] *See* National Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 423-26 (1965) (agreement to limit purchases of wheat, thereby maintaining lower prices, held illegal); 2 E. KINTNER, *supra* note 24, §§ 10.2-10.18, at 62-128 (discussing aspects of price fixing).

found.[35] In *United States v. Colgate*[36] the Court held that a seller could refuse unilaterally to deal with a customer who did not adhere to suggested retail prices.[37] However, such a refusal must be purely unilateral, and since this is rarely the case, most refusals to deal for failure to maintain suggested prices are found to be violations of the Sherman Act.[38]

An exception to the prohibition against price fixing is found in the area of patent law. In *United States v. General Electric*,[39] the Court held that a patentee could restrict the prices at which his licensee could sell his patented product, reasoning that the ability to set conditions upon use was part of the reward of the patent.[40] However, the owners of two patents may not cross-license and then fix the prices to be charged for the resulting product.[41]

2. Division of Territories

Horizontal agreements among competitors to divide up a market for a particular product or service are per se violations of section 1.[42] As with price fixing, no defenses or justifications are allowed.[43] The rationale for this rule is that, by dividing territories, each competitor is given a monopoly in his own area with the resultant power to fix prices.[44]

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[35] *See* Albrecht v. Herald Co., 390 U.S. 145, 149-52 (1968) (resale price fixing per se violation if done by agreement or combination); United States v. Parke, Davis & Co., 362 U.S. 29, 45-47 (1960) (conspiracy between distributors and retailers to maintain resale prices violated Sherman Act).

[36] 250 U.S. 300 (1919).

[37] *Id.* at 307.

[38] In United States v. Parke, Davis & Co., 362 U.S. 29 (1960), the applicability of the *Colgate* doctrine was, in the thinking of most observers, greatly restricted: "When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices . . . he has put together a combination in violation of the Sherman Act." *Id.* at 44. *See generally* Dam & Pitofsky, *Debate: Is the Colgate Doctrine Dead?*, 37 A.B.A. ANTITRUST L.J. 772 (1968); Levi, *The Parke, Davis-Colgate Doctrine: The Ban On Resale Price Maintenance,* 1960 SUP. CT. REV. 258.

[39] 272 U.S. 476 (1926).

[40] *Id.* at 493-94. The *General Electric* case has been a subject of much criticism and debate. *See, e.g.*, Austern, *Fish Traps, Indians and Patents: The Antitrust Validity of Patent License Restrictions on Sales, Price, Field of Use, Quantity and Territory,* 28 U. PITT. L. REV. 181, 184-88 (1966) (examining the erosion of the patentee's right to fix the price at which his licensee sells).

[41] United States v. Line Material Co., 333 U.S. 287, 307 (1948). In that case the Court stated, "[i]n the absence of patent or other statutory authorization, a contract to fix or maintain prices in interstate commerce has long been recognized as illegal *per se* under the Sherman Act." *Id.* (footnotes omitted).

Vertical divisions of territories are agreements whereby a manufacturer imposes restrictions upon the territories in which his dealers may sell or places limits upon the customers to whom the dealers may sell. In *United States v. Arnold, Schwinn & Co.,*[45] the Court held such restrictions to be per se violations of section 1.[46] The per se rule of *Schwinn* was overruled, however, by *Continental T.V., Inc. v. GTE Sylvania Inc.*,[47] where the Court held that vertical restrictions on territories and customers are to be tested under the rule of reason.[48]

3. Tying Arrangements

The Supreme Court has defined a tying arrangement as an agreement by one party to sell a product, the tying product, on the condition that the purchaser buy another distinct product, the tied product.[49] A tying arrangement is illegal under section 1 of the Sherman Act if the seller has sufficient market power in the tying product to foreclose a substantial volume of the market for the tied product.[50] The requisite market power may be the result of a legal monopoly, such as a patent or copyright held by the seller over the tying product,[51] or the result of extensive land holdings in a particular area,[52] or, in certain cases, the result of the seller's ability to offer unique or advantageous terms which none of his competitors is able to offer.[53]

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[42] *E.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972) (division of territories by association of grocers); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 595-98 (1951) (territorial division of world markets).

[43] United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972).

[44] *See* Addyston Pipe & Steel Co. v. United States, 175 U.S. 211, 241 (1899) (agreement to divide territories enhances price and thus restrains trade). *See generally* Comment, *Horizontal Territorial Restraints and the Per Se Rule,* 28 WASH. & LEE L. REV. 457 (1971).

[45] 388 U.S. 365 (1967).

[46] *Id.* at 379.

[47] 433 U.S. 36 (1977).

[48] *Id.* at 57-58. *See generally* Pitofsky, *The Sylvania Case: Antitrust Analysis of Non-Price Vertical Restrictions,* 78 COLUM. L. REV. 1 (1978).

[49] Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958) (lessees of land owned by railroad required to ship over railroad line).

[50] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605-09 (1953) (purchasers of advertising space in morning newspaper required to buy same unit in evening newspaper).

Tying arrangements have been justified when employed by a new business with an uncertain future to assure that proper equipment will be used in conjunction with its product and to allow for the testing of new products.[54] In other cases, tying arrangements have been held to be legal where an additional product is essential for the proper functioning of the tying product.[55]

Where the tying product is a patented product of the seller, it is generally held that conditioning its purchase on the purchase of another unpatented product is a violation of both section 1 of the Sherman Act and section 3 of the Clayton Act.[56] However, in *Electric Pipe Line v. Fluid Systems*,[57] where the owner of a combination patent designed the installation and guaranteed its performance, the Court held it was not unlawful for him to require the buyer to purchase components from him.[58]

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[51] *See* United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948) (copyright); International Salt Co. v. United States, 332 U.S. 392, 395-96 (1947) (patent).

[52] *See* Northern Pac. Ry. v. United States, 356 U.S. 1, 2-8 (1958) (railroad tied agreements to ship over its lines to sale or lease of valuable land).

[53] *See* United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 617-22 (1977) (offer of full financing unavailable from other sources not found to be a unique term).

[54] United States v. Jerrold Elec. Corp., 187 F. Supp. 545, 552-58 (E.D. Pa. 1960) (patentee's practice of selling equipment only in conjunction with service contract was reasonable since system failures would have greatly harmed the new industry), *aff'd per curiam*, 365 U.S. 567 (1961).

[55] In Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653, 656 (1st Cir.), *cert. denied*, 368 U.S. 931 (1961), a manufacturer was permitted to use a tie-in arrangement largely because his customers had complained of breakdowns when using his product in conjunction with products manufactured by another source. 292 F.2d at 656.

For a more complete analysis of tie-ins, see Ferguson, *Tying Arrangements and Reciprocity: An Economic Analysis*, 30 Law & Contemp. Prob. 552 (1965); Markovitz, *Tie-ins, Reciprocity, and the Leverage Theory,* 80 Yale L.J. 195 (1970); Turner, *The Validity of Tying Arrangements Under the Antitrust Laws*, 72 Harv. L. Rev. 50 (1958).

[56] *See* Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661, 667 (1944) (tying unpatented device runs afoul of antitrust law even if device is part of patented whole); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 490-91 (1942) (patent gives no immunities from antitrust violations for products not within grant). The types of tying arrangements attacked under § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), are more limited than those challenged under the Sherman Act; but, the procedure is not as difficult. 2 E. Kintner, *supra* note 24, § 10.52 at 226. Tie-ins are prohibited under the Federal Trade Commission Act. 15 U.S.C. § 45(a) (1976).

[57] 231 F.2d 370 (2d Cir. 1956).

B. *Monopolization and Attempts to Monopolize in Violation of Section 2*

Section 2 of the Sherman Act prohibits monopolization, conspiracy or combination to monopolize, and attempts to monopolize.[59] There are two elements involved in a monopolization offense: (1) possession of monopoly power in the relevant market and (2) the intent to monopolize.[60] Monopoly power exists where one has sufficient power over any part of trade or commerce to control prices or to exclude a competitor.[61] If the alleged monopolist has the requisite power over price and competition, the intent to monopolize may be assumed.[62]

To determine a defendant's market share it is necessary to determine the relevant geographic market and the relevant product market. The relevant geographic market is the area in which the seller and his competitors sell.[63] The relevant product market includes those products which are of like price, quality, and grade so that they are reasonably interchangeable by consumers.[64]

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[58] *Id.* at 371-72. The guarantee distinguished this case from Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944). 231 F.2d at 372. For a discussion of tie-ins involving patents and the corollary issues of patent misuse and contributory infringement, see generally Frost, *Tying Clauses and Package Licensing,* 28 U. PITT. L. REV. 207 (1966); Oppenheim, *Patents and Antitrust: Peaceful Coexistence?,* 54 MICH. L. REV. 199 (1955); Schueller, *The New Antitrust Illegality Per Se: Forestalling and Patent Misuse,* 50 COLUM. L. REV. 170 (1950); Note, *Contributory Infringement and Misuse,* 66 HARV. L. REV. 909 (1953).

[59] See note 25 *supra* for text of § 2 of the Sherman Act.

[60] United States v. Grinnel Corp., 384 U.S. 563, 570-71 (1966).

[61] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); *see* P. AREEDA & D. TURNER, ANTITRUST LAW §§ 500-536, at 321-430 (1978) (discussion of techniques for defining market power).

[62] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 392 (1956); *see* United States v. Paramount Pictures, Inc., 334 U.S. 131, 173 (1948) (intent to monopolize was assumed).

[63] *See* United States v. Grinnel Corp., 384 U.S. 563, 575-76 (1966) (relevant geographic market for central station protective services was national).

The percentage of the market held by the defendant is considered a primary indication of monopoly power.[65] Other contributing factors which are significant in determining the presence of monopoly power include: strength of remaining competition, whether the company's actions were motivated by business requirements or a purpose to monopolize, likelihood of future development in the industry, customer demand, and barriers to entry into the market.[66]

In addition to actual monopolization, section 2 also makes conspiracies to monopolize and attempts to monopolize violations.[67] Establishing a conspiracy to monopolize requires proof of three elements: concerted action pursuant to an express or implied agreement, specific intent to acquire monopoly power,[68] and an effect on an appreciable part of interstate commerce.[69] To establish an attempt to monopolize in violation of section 2, overt acts in furtherance of a specific intent to establish monopoly power must be proved.[70] The plaintiff must also show that the defendant, in his attempt to monopolize, possessed sufficient market power to create a dangerous probability of monopolization.[71] Courts usually require analysis of relevant market shares to demonstrate the dangerous probability of monopolization.[72]

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[64] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 393 (1956) (relevant product market includes substitute goods and not merely the market for particular goods produced by alleged monopolizer).

[65] *See, e.g.*, United States v. Grinnel Corp., 384 U.S. 563, 571 (1966) (87% of relevant market constitutes monopoly power); International Boxing Club, Inc. v. United States, 358 U.S. 242, 247-49 (1959) (81% of relevant market); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 398-404 (1956) (75% of market for cellophane but 20% of relevant market for flexible wrapping materials; no monopoly power in relevant market); United States v. American Tobacco Co., 221 U.S. 106, 162 (1911) (86% of relevant market constituted monopoly power); Standard Oil Co. v. United States, 221 U.S. 1, 33, 72-74 (1911) (90% relevant market); United States v. Aluminum Co. of America, 148 F.2d 416, 424 (2d Cir. 1945) (90% of relevant market is sufficient to constitute monopoly power; doubtful whether 64% is sufficient; 33% is not sufficient).

[66] United States v. Columbia Steel Co., 334 U.S. 495, 527-28 (1954).

[67] 15 U.S.C. § 2 (1976).

[68] American Tobacco Co. v. United States, 328 U.S. 781, 809-14 (1946).

[69] United States v. Yellow Cab Co., 332 U.S. 218, 233 (1947).

[70] Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 628 (1953).

[71] *See* American Tobacco Co. v. United States, 328 U.S. 781, 785 (1946) (approving jury instruction that included as element dangerous probability of monopolization); Swift & Co. v. United States, 196 U.S. 375, 396 (1905) (dangerous probability combined

III. CONVERGENCE OF THE COPYRIGHT LAW AND THE SHERMAN ACT

The Copyright Act grants to the copyright owner a statutory monopoly that is limited to the exclusive rights designated in the Act.[73] While the reward of exclusive rights is necessary to provide an incentive for authors, artists, and publishers, this reward is a secondary consideration[74] to the underlying purpose of the grant of copyright monopoly, which is to stimulate intellectual and artistic creation.[75] Another important consideration is the benefit to the public that flows from the dissemination of the copyrighted work.[76] Thus, the copyright law and the Sherman Act have the common purpose of benefitting the public. However, the former sanctions a monopoly and the latter forbids it. In order to resolve the conflicts between these laws, the competing interests of both must be weighed, with the balance tipping in favor of that interest which provides the greater public benefit at a lower cost to the public. Secondary consideration should be given to the possible benefit to the copyright owner or his competitors.[77] This section addresses the courts' approach to

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with intent is sufficient to proscribe attempt to monopolize); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1030 (2d Cir. 1976) (to establish attempt to monopolize, dangerous probability of success must be shown), *cert. denied*, 429 U.S. 1097 (1977). *But see* Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir.) (if plaintiff shows specific intent and overt action, he need not show probability of monopoly), *cert. denied,* 377 U.S. 993 (1964).

[72] *See, e.g.*, Walker Process Equip., Inc. v. Food Mach. & Chem. Co., 382 U.S. 172, 177 (1965) (dictum) (attempt to monopolize requires appraisal of patent's exclusionary power in terms of relevant product market); Yoder Bros. v. California-Fla. Plant Corp., 537 F.2d 1347, 1368 (5th Cir. 1976) (with 20% market share, there was no dangerous probability of success in the attempt to monopolize), *cert. denied,* 429 U.S. 1094 (1977).

See generally L. SULLIVAN, *supra* note 27, §§ 5-58, at 19-151 (1977); Bowman, *Toward Less Monopoly,* 101 U. PA. L. REV. 577 (1953); Note, *Attempt to Monopolize Under the Sherman Act: Defendant's Market Power as a Prerequisite to a Prima Facie Case,* 73 COLUM. L. REV. 1451 (1973).

[73] Twentieth Century Music Corp. v. Aiken, 422 U.S. 151, 154-55 (1975); *see* notes 8 through 19 and accompanying text *supra.*

[74] Mozer v. Stein, 347 U.S. 201, 219 (1954).

[75] Goldstein v. California, 412 U.S. 546, 555 (1973).

[76] United States v. Paramount Pictures, Inc., 334 U.S. 131, 158 (1948).

[77] *Id.*

resolving the dilemma arising out of the convergence of the copyright law and the Sherman Act.

A. *The Copyright Law and Section 1 of the Sherman Act*

1. Retail Price Maintenance of Copyrighted Articles

The United States Supreme Court first considered the copyright-antitrust problem in *Bobbs-Merrill Co. v. Straus.*[78] In that case, a copyrighted book was published with a notice in the book that no licensee was authorized to sell the book for less than one dollar, and that sale at a lower price would be treated as copyright infringement.[79] Contending that there was authority under the copyright statute to control retail prices, the publisher maintained that the retail book seller had infringed the copyright license.[80] The Court disagreed and recognized that while the copyright owner had the exclusive right to sell the book, there was no right to impose, by notice, a minimum price at which the book could be resold.[81] After sale of a copyrighted article, restrictions on use are beyond the scope of the copyright monopoly.[82] However, the Court did not decide whether the publisher's license agreements violated the Sherman Act.[83]

Publishers' agreements with book sellers to maintain retail prices were found to be in violation of the Sherman Act in *Straus v. American Publishers Association.*[84] The Court, finding that agreements between an association of publishers and a booksellers' association almost completely destroyed price competition among book sellers in the United States, held that the agreements were not justified by the Copyright Act and that they violated section 1 of the Sherman Act.[85] These decisions established two basic propositions: (1) the copyright law does not permit copyright owners, after sale of the copyrighted article, to restrict the price at which the article may subsequently be resold; and (2) agreements by copyright owners conspiring to maintain prices on copyrighted articles are not justified by the Copyright Act and constitute a violation of section 1 of the Sherman Act.[86]

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[78] 210 U.S. 339 (1908).

[79] *Id.* at 341.

[80] *Id.* at 343.

[81] *Id.* at 350; *cf.* Bauer & Cie v. O'Donnel, 229 U.S. 1, 17 (1912) (patentee does not have right to limit the price at which a patented article may be resold at retail).

[82] 210 U.S. at 351.

[83] *Id.*

[84] 231 U.S. 222 (1913).

[85] *Id.* at 235-36.

Maintenance of retail prices on copyrighted articles is comparable to an attempt by the owner of a copyrighted motion picture to grant an exhibition license that establishes a minimum admission price that an exhibitor must charge his theatre patrons. In *Interstate Circuit, Inc. v. United States*,[87] the Supreme Court considered the permissibility of this practice. In that case, the government brought suit against eight separate motion picture distributors and two affiliated exhibitors.[88] Each of the distributors agreed with both exhibitors that, in licensing other exhibitors, minimum admission prices would be maintained and exhibition of double features would be prohibited.[89] Although there was no express agreement among the distributors nor simultaneous action on their part, the Court found that the evidence was sufficient to establish an unlawful conspiracy under the Sherman Act.[90] Recognizing that the owners of a copyrighted motion picture have the exclusive right to exhibit the film and to grant restrictive and exclusive licenses for exhibition,[91] the Court rejected the distributors' contention that their copyrights were sufficient to remove the price maintenance agreements from the operation of the Sherman Act.[92] The distributors argued that since the owner of a patent, in a license to manufacture and sell the patented article, may lawfully fix the price at which the licensee can sell the article, then the owner of a copyright should likewise be able to restrict admission prices.[93]

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[86] *See generally* H. TOULMIN, ANTITRUST LAWS §§ 28.1-28.21, at 820-23 (1950) (discussing combinations of book sellers and publishers to control prices).

[87] 306 U.S. 208 (1939).

[88] *Id.* at 214. The distributor defendants were distributors of 75% of all first class feature films exhibited in the United States. *Id.* Interstate Circuit was an affiliated exhibitor which operated 43 theatres in six Texas cities. *Id.* at 215.

[89] *Id.* at 217-18.

[90] *Id.* at 226-27.

[91] *Id.* at 227.

[92] *Id.* at 228.

[93] *Id.* The distributors relied upon United States v. General Elec. Co., 272 U.S. 476

The Court did not address this contention directly, but stated that even if each distributor were free to impose the price restrictions on his licensee, the distributors were not permitted to use their copyrights collectively to restrain commerce in order to protect the exhibitor's monopoly by suppressing competition.[94] Thus, it is clear that copyright owners may not combine, conspire, or agree to impose restrictions on minimum prices that their licensees may charge. However, it is not clear whether a copyright holder may unilaterally impose such restrictions on his licensee in the absence of collective activity with other copyright holders. The Court also found that the contracts between each distributor and the exhibitor, which contained provisions for imposition of the minimum admission prices on the exhibitor's competitors, violated the Sherman Act.[95] Therefore, the copyright owner cannot lawfully agree with a third party to impose a minimum admission price on a subsequent licensee. Although the Court in *Interstate Circuit* left unanswered the question of the right of a licensor of a copyrighted film to impose price restrictions on his licensee,[96] the issue was characterized as "wholly academic" in a subsequent case.[97]

2. Price Fixing and Copyrights

In *United States v. Paramount Pictures, Inc.*,[98] the trial court established that there was a horizontal price fixing conspiracy among the major motion picture distributors and a vertical price fixing conspiracy between each of the distributors and

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(1926), which held that the owner of a patented article could fix the price at which his agents transferred title to the purchaser. 306 U.S. at 488; *see* note 40 and accompanying text *supra*.

[94] 306 U.S. at 228-32.

[95] *Id.* at 228.

[96] *Id.* at 227-28.

[97] United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 (1948). In Columbia Pictures Corp. v. Coomer, 99 F. Supp. 481 (E.D. Ky. 1951), a federal court did address this "wholly academic" issue. In affirming the right of a copyright owner to impose minimum admission prices for a copyrighted film, the court reasoned that such a practice was reasonable and normally adopted to secure the copyright owner's reward under the copyright monopoly. *Id.* at 482 (citing United States v. General Elec. Co., 272 U.S. 476, 489-90 (1926)).

[98] 334 U.S. 131 (1948).

their licensees.[99] Finding the evidence sufficient to establish the vertical price fixing conspiracy, the Supreme Court rejected the contention that copyrights on the motion pictures provided immunity from a Sherman Act violation.[100] Stating that express agreements were not necessary to establish a horizontal price fixing scheme, the Court also found a horizontal price fixing violation of the Act.[101] The Court applied the per se rule against price fixing to the horizontal conspiracy,[102] rejecting arguments that the rule should not apply when the fixed prices pertain to copyrighted articles.[103]

In the federal district court case of *Alden-Rochelle, Inc. v. ASCAP*,[104] the American Society of Composers, Authors, and

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[99] *Id.* at 142.

[100] *Id.* at 142-44.

[101] *Id.* at 142-43.

[102] *Id.* at 143; *see* notes 28 through 35 and accompanying text *supra* (discussion of per se rule).

[103] 334 U.S. at 143-44. In support of the application of the per se rule, the Court drew an analogy to previous holdings involving price fixing and patents. *Id.* (citing United States v. United States Gypsum Co., 333 U.S. 364, 400-01 (1948), for the proposition that patent owners could not control an entire industry through licenses that contained price fixing agreements). The Court found that the defendants had similarly controlled admission prices for the exhibition of motion pictures throughout the entire movie industry. 334 U.S. at 143. Reasoning that since the rights of a copyright owner are not greater than those of patent owners, the Court concluded that the horizontal conspiracy was illegal. *Id.* at 143-44. *Paramount* also involved clearance provisions. In a copyright license between a distributor and an exhibitor, a clearance provision provides that the licensed film will not be licensed to another exhibitor for a designated period of time. The Court determined that clearances which are reasonable for the exhibitors' protection are not unlawful. *Id.* at 145-48. However, the evidence was deemed sufficient to support the trial court's finding of a conspiracy to restrain trade through imposition of unreasonable clearances. *Id.* at 146.

[104] 80 F. Supp. 888 (S.D.N.Y. 1948). ASCAP is an unincorporated association of authors, composers, and publishers that was formed in 1914 for the purpose of licensing the nondramatic performance rights of copyrighted musical compositions. *Id.* at 891. The primary purpose for the formation of ASCAP was to detect infringement of its members' copyrights because, on an individual basis, it would have been difficult and almost impossible for the copyright owner to discover arbitrary infringements of the performing right. *Id.* In order to enforce their copyrights, the ASCAP members assigned their performing rights to the association, and ASCAP would have its representatives patronize establishments that performed music. *Id.* When infringements were discovered, ASCAP would ask the establishment to take a blanket license that covered all compositions of the ASCAP members and upon refusal by the infringer, ASCAP would file an infringement suit. *Id.* The funds collected from the issuance of the blanket licenses, after deduction of expenses, would then be distributed among the ASCAP members. *Id.*

Publishers (ASCAP) and its members were charged with a price fixing conspiracy. The operators of several motion picture theatres brought suit challenging the procedure for licensing the performing rights to copyrighted music in motion picture soundtracks.[105] Blanket licenses covering all compositions in ASCAP's repertory were issued to the exhibitors and "very reasonable" annual license fees, based on the theatre's seating capacity, were charged.[106] The exhibitors contended that ASCAP constituted an illegal monopoly and that its price fixing power was an unlawful restraint of trade.[107] The court agreed,[108] and stated that neither the fact that ASCAP had been reasonable in the prices fixed, nor the fact that it served a legitimate purpose in enabling ASCAP members to detect copyright infringement would preclude a finding of a per se violation of the Sherman Act.[109]

For the historical, organizational, and structural aspects of ASCAP, see Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294, 295-96 (1954) (structure and function); White, *Musical Copyrights v. The Anti-Trust Laws*, 30 Neb. L. Rev. 50, 50-55 (1950) (history and organization); Comment, *ASCAP and the Antitrust Laws: The Story of a Reasonable Compromise*, 1959 Duke L.J. 258, 259-62 (same); Comment, *Music Copyright Associations and the Antitrust Laws*, 25 Ind. L.J. 168, 168-71 (1949) (history and structure).

[105] 80 F. Supp. at 890-92. This procedure involved the granting of three nonexclusive licenses. First, the owner of the musical copyright, a member of ASCAP, would assign his performing right to ASCAP. The ASCAP member would also license the film producer to record and synchronize the composition with the film's soundtrack. The performing rights to this synchronized version would, however, be excepted from this license agreement. Finally, after the motion picture exhibitor obtained a license to exhibit the film, ASCAP would grant to him a license to perform the synchronized version contained in the soundtrack. *Id.* at 892.

[106] *Id.* at 892.

[107] *Id.* at 895. The court found that ASCAP was an illegal monopoly in violation of § 2 of the Sherman Act.

[108] *Id.* at 895.

[109] The court did not expressly state that the per se rule was being applied. However, the court quoted from United States v. Trenton Potteries Co., 273 U.S. 392 (1927), which is often cited as the origin of the rule. The *Alden-Rochelle* court stated: "Agreements which create such potential power [to fix prices] may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed . . . ." 80 F. Supp. at 895 (quoting *Trenton Potteries,* 273 U.S. at 397-98).

At the time *Alden-Rochelle* was decided, ASCAP was operating under a consent decree entered into with the federal government. United States v. ASCAP, [1940-43] Trade Cas. ¶ 56,104 (S.D.N.Y. 1950). This decree was amended in 1950 and the provisions of the *Alden-Rochelle* decree were incorporated into the amended consent decree. United

Nine years later, in *Columbia Broadcasting Systems, Inc. v. ASCAP,*[110] the Court of Appeals for the Second Circuit applied the per se rule against ASCAP and held that its issuance of blanket licenses amounted to price fixing in violation of section 1 of the Sherman Act.[111] The court stated that Columbia Broadcasting Systems, Inc. (CBS) was not a party to the consent decree, and the decree did not "disinfect" ASCAP from a Sherman Act violation.[112] The court stated that there was a market necessity exception to the per se rule,[113] but found it inapplicable to

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States v. ASCAP, [1950-51] Trade Cas. ¶ 62,595 (S.D.N.Y. 1950). *See generally* Timberg, *supra* note 104.

A provision of this consent decree was used in K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968), to persuade the Court of Appeals for the Ninth Circuit that ASCAP was not guilty of price fixing. 372 F.2d at 4. The provision relied upon allowed each ASCAP license applicant who believed the fee proposed by ASCAP was unreasonable to apply to the District Court for the Southern District of New York to fix a reasonable fee. ASCAP, upon such application, had the burden to prove that the proposed fee was reasonable. The *K-91* court upheld the lower court's finding that ASCAP did not violate the antitrust laws against price fixing so long as they complied with the consent decree, since they had no final price fixing authority. Thus, the court did not reject the per se rule as applied to price fixing schemes by copyright holders, but rather found that because of the consent decree price fixing did not exist in this case. *Id.*

[110] 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* Broadcast Music, Inc. v. Columbia Broadcast Syss., Inc., 440 U.S. 1 (1979).

[111] 562 F.2d at 140.

[112] *Id.* at 139.

[113] *Id.* at 136-38. *CBS* was widely noted for its recognition of the market necessity exception. *See, e.g.,* Cirace, *CBS v. ASCAP: An Economic Analysis of a Political Problem,* 47 FORDHAM L. REV. 277, 280-89, 295-98 (1978) (economic analysis of the blanket license and monopoly power of networks); Note, *The Middle-Man as Price Fixer,* 91 HARV. L. REV. 488, 490-93 (1977) (concluding bulk licensing is most efficient alternative); Comment, *Antitrust Law—Price Fixing—Issuance of a Blanket License to a Television Network for Nondramatic Performing Rights Constitutes Price Fixing,* 6 HOFSTRA L. REV. 445, 451-60 (1978) (comparing per se rule with market functioning exception to rule of reason and concluding decision under rule of reason would have been better); Note, *CBS v. ASCAP: Performing Rights Societies and the Per Se Rule,* 87 YALE L.J. 783, 784-800 (1978) (concluding market necessity exception defeats purpose of per se rule and legislative exception is the solution).

The Second Circuit thought that the Ninth Circuit's rejection of the antitrust defense in *K-91* was based upon the market necessity exception. 562 F.2d at 137. However, it is clear from the *K-91* opinion that the basis of the court's decision was not the market necessity but the realization that ASCAP could not fix prices as long as it complied with the consent decree. K-91, Inc. v. Gershwin Publishing Corp., 372 F.2d 1 (9th Cir. 1967), *cert. denied,* 389 U.S. 1045 (1968).

the instant case.[114] On appeal,[115] the Supreme Court reversed, holding that the issuance of blanket licenses by ASCAP and Broadcast Music, Inc. (BMI) was not subject to the per se rule.[116] The Court characterized the blanket licenses issued by ASCAP and BMI as developments of the marketplace to prevent unauthorized use of copyrights and to provide users with unplanned and indemnified access to a large array of compositions.[117] Recognizing that the development of mass media had created the necessity for the blanket license and that restraints placed on ASCAP and BMI by the consent decrees could not be ignored, the Court remanded the case for a determination of the legality of the blanket license under the rule of reason.[118] On remand, the court of appeals determined that CBS had failed to show that the blanket licensing complained of restrained competition, and therefore under the rule of reason there was no violation of section 1 of the Sherman Act.[119]

3. Agreements Restricting the Territory Where a Copyrighted Article May be Used

Defining transfer of copyright ownership, the Copyright Act states that an exclusive license may be limited in time or place of effect.[120] The implication of the definition is that vertical territorial restrictions are sanctioned by the Act. However, the federal courts have not construed the definition in this manner. Neither are there any decisions dealing directly with horizontal agreements restricting the territory in which a copyrighted object may be performed, displayed, sold, exhibited, or used. In the absence of judicial precedent, it seems highly probable that the normal rules that apply to territorial restrictions should apply when copyrights are involved.[121]

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[114] 562 F.2d at 140.

[115] Broadcast Music, Inc. v. Columbia Broadcasting Syss., Inc., 441 U.S. 1 (1979).

[116] *Id.* at 24. BMI is a performing rights society which functions as a nonprofit corporation owned by firms in the broadcast industry. It operates in a manner similar to ASCAP. Both BMI and ASCAP employ blanket licenses. Together their repertoires contain almost all of the popular domestic copyrighted musical compositions. At the time of the decision, ASCAP was stated to have over three million compositions in its repertoire and BMI to have over one million. *Id.* at 5; *see* Garner, *United States v. ASCAP: The Licensing Provisions of the Amended Final Judgment of 1950*, 23 Bull. Copyright Soc'y 119, 121-23 (1975) (events leading to formation of BMI).

[117] 441 U.S. at 20.

[118] *Id.* at 21-25. *See generally* Hartnick, *From Black to White*, 27 Bull. Copyright Soc'y 1 (1979) (discussing the implication of Court's decision in *CBS*).

[119] CBS v. ASCAP, 620 F.2d 930, 937-39 (2d Cir. 1980).

[120] 17 U.S.C. § 101 (1976); *see* notes 8 through 19 and accompanying text *supra*.

4. Copyrights and Illegal Tying Arrangements

Tying arrangements that involve copyrights are unlawful under the federal antitrust laws, and when a tie-in involves patents or copyrights the courts presume that there is an unlawful extension of the statutory monopoly.[122]

In the copyright field, the practice of block-booking of feature length films constitutes a tying arrangement violative of section 1 of the Sherman Act. Block-booking is the licensing of one or a group of feature films on the condition that the film exhibitor accept a license for another film or group of films.[123] There are two Supreme Court decisions dealing with tying arrangements that involve copyrights, both of which concern block-booking.

In *United States v. Paramount Pictures, Inc.*,[124] the Court held that it was a violation of the antitrust laws to refuse to license one or a number of copyrights on the condition that an additional copyright be accepted.[125] The Court reasoned that this practice restrained trade by equalizing the reward for various copyrights, regardless of their merit on the competitive market, and by giving some films a larger market than they would have otherwise, thus decreasing the demand for other, more deserving, films.[126] In *United States v. Loew's, Inc.*,[127] the Court reaffirmed its position with respect to block-booking. Although the Court recognized the possibility that there might be a rare circumstance in which a tying arrangement involving a patented or copyrighted product would not be illegal, *Loew's* was not such a case.[128] In granting a remedy, the Court required distributors to quote individual prices on each film to television stations; however, package licensing was not prohibited if the films were offered individually and if the sum of individual prices was comparable to the package price.[129]

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[121] *See* United States v. Chicago Tribune-New York News Syn., Inc., 309 F. Supp. 1301, 1302 (S.D.N.Y. 1970) (territorial restrictions in exclusive license); notes 42 through 44 and accompanying text *supra*.

[122] L. SULLIVAN, *supra* note 27, § 86, at 244.

[123] United States v. Paramount Pictures, Inc., 334 U.S. 131, 156 (1948); *see* Stigler, *United States v. Loew's, Inc.: A Note on Block-Booking*, 1963 SUP. CT. REV. 152, 152-54 (economic analysis of block-booking).

[124] 334 U.S. 131 (1948).

[125] *Id.* at 159. In *Paramount*, copyrighted motion pictures which were unwanted were licensed as a condition for granting licenses to films which the exhibitors demanded.

[126] *Id.* at 158.

[127] 371 U.S. 38 (1962). The tie-in arrangements in *Loew's* involved the requirement

B. *Section 2 of the Sherman Act: Monopolization Through Copyrights and Copyright Pooling*

Although the Copyright Act grants a statutory monopoly to the copyright owner, the Act does not grant to copyright owners the right to combine in violation of the federal antitrust laws.[130] Such a combination is a monopoly and a violation of section 2 of the Sherman Act.[131] Furthermore, the illegality of an agreement which restrains competition and perpetuates a monopoly is not affected by the fact that the competitive article is copyrighted.[132] However, the Supreme Court has stated that the mere accumulation of a number of patents or copyrights into a pool does not

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of motion picture distributors that television stations accept unwanted films as a condition for licensing popular films. *Id.* at 48-50.

[128] *Id.* at 48-50.

[129] *Id.* at 50-54. The Court also prohibited price differences between the individual and package licenses unless the difference could be justified by a cost savings to the distributor. *Id.* at 54-55; *see* L. SULLIVAN, *supra* note 27, § 159, at 461 (package license which does not meet cost justification is unlawful tying arrangement); Stigler, *supra* note 123, at 152-54 (economic analysis of block-booking concluding effect of decision is to increase revenues of another set of monopolists, the television station owners); *cf.* Mulvey v. Goldwyn Prods., 433 F.2d 1073, 1075-76 (9th Cir. 1970) (plaintiff who sold film to distributor which licensed it by block-booking had standing to bring treble damage action against distributor).

[130] Watson v. Buck, 313 U.S. 387, 404 (1941).

[131] Alden-Rochelle, Inc. v. ASCAP, 80 F. Supp. 888, 893 (S.D.N.Y. 1948); *see* note 25 and accompanying text *supra*.

[132] Interstate Circuit, Inc. v. United States, 306 U.S. 208, 230 (1939). The possession of monopoly power in the relevant market and the intent to monopolize are the two elements necessary to establish monopolization in violation of § 2. *See* notes 71 through 72 and accompanying text *supra*.

in itself constitute unlawful monopolization.[133]

In *CBS v. ASCAP,* the district court held that because ASCAP and BMI were limited by consent decrees in their power to control prices, and since they had no power to exclude competitors because of CBS' access to other sources, they had no monopoly power[134] and were not guilty of a section 2 violation.[135] On appeal, the Court of Appeals for the Second Circuit agreed with the district court on the monopolization issue;[136] this issue was not, however, considered by the Supreme Court.[137]

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[133] Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827, 834 (1950). That case held that it was not misuse of the patent monopoly to license a user to use a large number of patents and to charge royalties based on the user's sales in a certain line of goods regradless of whether the patents were used to manufacture those goods. *Id.* at 834. *But see* Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 135 (1969) (patentee cannot require royalty based on sale of goods that are not manufactured under licensed patents).

Although the accumulation of copyrights does not itself constitute monopolization, the court in *Alden-Rochelle,* 80 F. Supp. 888 (S.D.N.Y. 1948), stated that where copyright owners combine their copyrights, a monopoly is created that extends beyond the granted legal monopoly, and thus there is a violation of § 2. *Id.* at 893-94.

The same district court that decided *Alden-Rochelle* was later presented with an almost identical question in Affiliated Music Enterprises v. Society of European Stage Actors (SESAC), 160 F. Supp. 865 (S.D.N.Y. 1958), *aff'd,* 268 F.2d 13 (2d Cir.), *cert. denied,* 351 U.S. 831 (1959). SESAC, engaged in collecting assignments of copyrighted musical performance rights and issuing blanket rights to users, was found to control only 20% to 30% of the relevant market in performance rights to gospel music. The court found that there was no monopoly power to control prices or to exclude competitors, and therefore no violation of § 2 of the Sherman Act. 160 F. Supp. at 867-75.

[134] CBS v. ASCAP, 400 F. Supp. 737, 783 (S.D.N.Y. 1975), *rev'd,* 562 F.2d 130 (2d Cir. 1977), *rev'd sub nom.* BMI v. CBS, 440 U.S. 1 (1979).

[135] 400 F. Supp. at 782-83. The court also determined that there was no substantial evidence that ASCAP and BMI had attempted to monopolize the market for performance rights with respect to the networks and that the networks had obtained the blanket licenses on their own volition. *Id.* at 783.

[136] 562 F.2d at 135, 141 n.29.

[137] 440 U.S. at 6-7. *Alden-Rochelle* can be distinguished from *CBS v. ASCAP* because in the former case the court found that the defendant had the power to control prices and exclude competitors, whereas in the latter the court found that the defendants did not have this power. Thus, it could be concluded from these cases that the pooling of copyrights and the issuance of blanket licenses is only a violation of § 2 when the power to control prices and exclude competitors is created as a result of the combination.

C. *Sherman Act Violation as a Defense to Copyright Infringement*

Violation of the exclusive rights of the copyright owner gives rise to an action for infringement of the copyright[138] for which injunctive relief[139] and damages[140] may be awarded. When the copyright owner seeks damages only, the infringement action is brought at law.[141] However, if equitable remedies are sought, the infringement action is equitable in nature.[142] Thus equitable defenses such as unclean hands[143] and misuse of copyright[144] are common defenses to copyright infringement actions.[145] The fact that the copyright owner has violated the antitrust laws has also been asserted as an equitable defense in infringement actions.[146]

In *M. Witmark & Sons v. Jensen,*[147] a member of ASCAP brought an action for damages for copyright infringement and asked that future violations be enjoined.[148] The district court determined that ASCAP had violated sections 1 and 2 of the Sherman Act, and as a result the ASCAP member had extended his copyright monopoly beyond its proper scope.[149] Accordingly, the court denied relief for the infringement on the ground that equity should deny relief to one who has misused the copyright.[150] The court did not determine that a Sherman Act violation, standing alone, constituted a defense to an infringement action; but, because the Sherman Act violation constituted an unlawful extension of the copyright monopoly and a misuse of the copyright, the violation of the Act became an indirect defense.[151] One source of confusion in the areas of copyright and patent misuse is that the term "misuse" has been employed in two different situations: misuse involving an unlawful extension of the copyright or patent monopoly, and misuse involving conduct that violates the antitrust laws.[152] In *Alfred Bell & Co. v. Catalda Fine Arts*,[153] copyright owners brought an infringement suit which was defended on grounds that the owners had conspired in violation of the Sherman Act. The court found that there was a clear case of infringement and a marginal violation of antitrust law and, balancing the competing policies of prevention of piracy of copyrighted matter and enforcement of the antitrust laws,[154] ruled that the antitrust defense could not defeat the infringement action.[155]

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[138] 17 U.S.C. § 501(a) (1976).

[139] *Id.* § 502(a).

[140] *Id.* § 504(a). Actual damages to the copyright owner and the infringer's profits may be recovered. *Id.* § 504(b). Alternatively, the copyright owner may recover statutory damages. *Id.* § 504(c). The minimum statutory damage amount is $250 per infringement; the maximum amount is $10,000. *Id.* The actual amount of statutory damages recovered is in the court's discretion. *Id.*

[141] Tempo Music, Inc. v. Myers, 407 F.2d 503, 507 n.8 (4th Cir. 1969).

[142] *Id.* If the copyright owner has an adequate remedy at law, equitable relief will be denied. American Metro. Ent. of N.Y., Inc. v. Warner Bros. Records, Inc., 389 F.2d 903, 905 (2d Cir. 1968); *see* Shapiro, Bernstein & Co. v. 4636 S. Vermont Ave., Inc., 367 F.2d 236, 242 (9th Cir. 1966) (injunction denied where no probability of additional infringements).

[143] *See, e.g.,* Mitchell Bros. Film Group v. Cinema Adult Theater, 604 F.2d 852, 863 (5th Cir. 1979) (obscenity does not constitute unclean hands defense); Tempo Music, Inc. v. Myers, 407 F.2d 503, 506-07 (4th Cir. 1969) (ASCAP's failure to provide nightclub proprietor with list of compositions in repertory constituted unclean hands).

[144] *See, e.g.,* Greenbie v. Noble, 151 F. Supp. 45, 62 (S.D.N.Y. 1957) (copyright owner's refusal to publish biography was not a misuse).

[145] However, the Supreme Court had held that equitable doctrines should not be applied to defeat the purpose of a statute. Perma-Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 138 (1968).

[146] H. Toulmin, *supra* note 86, § 28.5, at 812-14.

[147] 80 F. Supp. 843 (D. Minn. 1948), *appeal dismissed sub nom.* M. Witmark & Sons v. Berger Amusement Co., 177 F.2d 515 (8th Cir. 1949).

[148] 80 F. Supp. at 844.

In a more recent case, *Ortho-Vision, Inc. v. Home Box Office*,[156] the court held the general rule to be that a copyright holder's violation of the antitrust laws does not constitute a defense to a copyright infringement action.[157] The court noted that antitrust violations had been held to be defenses to patent infringement actions and reasoned that the rationale in those cases might be extended to copyrights, although the Supreme Court has not ruled on the issue.[158] In *Ortho-Vision* the court found that no logical relationship existed between the anticompetitive activity of the plaintiff and its position as a copyright holder, and therefore, the court concluded that the antitrust defense should not be allowed.[159]

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[149] *Id.* at 850.

[150] *Id.* There were several cases prior to *Witmark* which held that Sherman Act remedies were exclusive and did not constitute a defense to infringement actions brought by ASCAP. *E.g.*, Buck v. Cecere, 45 F. Supp. 441, 442 (W.D.N.Y. 1942) (allegation of plaintiff's use of copyright to monopolize); Buck v. Spanish Gables, Inc., 26 F. Supp. 36, 37 (D. Mass. 1938) (illegal restraint of trade not a defense); Buck v. Newsreel, Inc., 25 F. Supp. 787, 789 (D. Mass. 1938) (same).

[151] 80 F. Supp. at 850.

[152] Gibbs, *Copyright Misuse: Thirty Years Waiting for the Other Shoe*, 23 ASCAP COPYRIGHT L. SYMP. 31, 39-40 (1977).

[153] 191 F.2d 99 (2d Cir. 1951).

[154] *Id.* at 106.

[155] *Id.; see* Inge v. Twentieth Century-Fox Film Corp., 143 F. Supp. 294, 298-99 (S.D.N.Y. 1956) (citing *Alfred Bell*).

[156] 474 F. Supp. 672 (S.D.N.Y. 1979).

[157] *Id.* at 686.

IV. Conclusion

The major difficulty created by the interaction of copyright and antitrust law is reconciling the need for practical marketing devices for copyrights with long-established prohibitions against certain types of business practices. This problem has arisen primarily with respect to performing rights societies which issue blanket licenses to users.[160]

The purpose of the copyright law is to provide the public with the benefits of artistic and creative endeavors.[161] If an author or composer is unable to market his product successfully, the public is deprived of the benefit of his work. In the modern entertainment industry, the existence of thousands of copyright holders and users, the need of users to have quick access to a large number of copyrighted works, and the inability of individual copyright holders to market their works efficiently and guard against infringement makes licensing on a one-to-one basis impractical.[162] Thus, the use of performing rights societies as selling agencies for copyright holders is necessary in order for the public to obtain the benefit of the author's work and is beneficial to copyright holders and users alike.

Difficulties arise when the activities of the society, which are necessitated by the peculiar needs of the enterprise, constitute what otherwise would be a per se violation of the Sherman Act. Being presented with this dilemma, the courts have three options. First, they may find the practice to be a per se violation of the Sherman Act and thus destroy an effective and beneficial business practice.[163] Second, they may create an exception to the per se rule.[164] However, since this would require in each instance an inquiry into the nature of the activity to determine if it falls within the exception, the function of per se rules in eliminating the need for a case-by-case analysis would be destroyed.[165] Third, the courts may find that the challenged activity is not of such a detrimental nature that it should be classified as a per se violation and examine the activity under the rule of reason.[166]

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[158] *Id.*

[159] *Id.* Although the status of the law in this area is somewhat unclear, the rule appears to be that antitrust violations may be asserted as defenses to copyright infringement actions only when the suit is for equitable relief and there is a nexus between the antitrust violation and the plaintiff's status as a copyright holder.

[160] *See* notes 104 through 119 and accompanying text *supra.*

[161] *See* notes 73 through 76 and accompanying text *supra.*

[162] BMI v. CBS, 441 U.S. 1, 20-25 (1979).

Several commentators have suggested that the solution to this problem is legislation providing an exception to the antitrust laws for performing rights societies,[167] similar to that which exists for agricultural cooperatives and labor unions,[168] and creating a federal agency to regulate their activities.[169] These suggestions are both unwise and unnecessary.

The basic premise underlying the antitrust laws is that competition is highly beneficial to the economic well-being of our society.[170] In view of this premise, exceptions to the antitrust laws should be allowed only where there is substantial justification for the exception and where an alternative protective device is created to prevent undue restraints of competition which would be detrimental to the economy.[171]

The establishment of a federal agency to regulate the performing rights societies would create a protective device to ensure fair competition. However, if the courts are capable of performing this function, it would be a waste of national resources to transfer this responsibility from the judicial to the administrative forum. Since the dilemma facing the courts with respect to performing rights societies can be resolved by applying a proper conceptual analysis, there is no justification for creating a new exception to the antitrust laws or for expending federal funds to create a new federal agency.

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[163] *See* note 109 and accompanying text *supra*.

[164] *See* note 113 and accompanying text *supra*.

[165] *See* YALE L.J. Note, *supra* note 113, at 784-800 (market function exception would swallow per se rule).

[166] *See* BMI v. CBS, 441 U.S. 1, 8-25 (1979) (remanding the issue of blanket licensing for consideration under the rule of reason).

[167] *See* YALE L.J. Note, *supra* note 113, at 802.

[168] 15 U.S.C. § 17 (1976).

[169] *See* YALE L.J. Note, *supra* note 113, at 802. One commentator suggested that the industry is a national monopoly and should therefore be regulated as a utility is regulated. *See* HARV. L. REV. Note, *supra* note 113, at 497 n.44.

[170] *See* note 23 *supra*.

[171] *See* BMI v. CBS, 441 U.S. at 34-38 (Stevens, J., dissenting) (antitrust policy demands close scrutiny, especially where the statutory copyright and patent monopolies are involved).

A careful study of the Supreme Court's reasoning in *BMI v. CBS*[172] reveals an approach to per se analysis which neither forbids economically desirable business practices nor violates the integrity of per se rules. Under the *BMI* analysis, a term such as "price fixing" denotes a general category of specific business practices which are so detrimental to competition that they always constitute unreasonable restraints of trade.[173] Each time the Court is faced with a new type of business practice it must determine whether it is the type of activity which should be included under a general category of per se violations.[174] If it is determined that the new business practice properly belongs in one of the general categories of forbidden activity, inquiry into its reasonableness in subsequent cases is unnecessary.[175] Thus, the Court's approach in *BMI v. CBS* wisely avoided the undesirable option of either automatically applying the per se rule to a broad range of business practices or making an exception to the rule.[176] This approach should be followed in future cases where the copyright and antitrust laws converge.

*Charles I. Knauss, Jr.**

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[172] 441 U.S. 1 (1979).

[173] *Id.* at 8-9.

[174] *Id.* at 9-10.

[175] *See* notes 29 through 35 and accompanying text *supra.*

[176] In examining the blanket license, the Court found benefits to both buyers and sellers, so that this business practice was made more than a "naked restraint of trade with no purpose except stifling of competition." 441 U.S. at 20 (quoting White Motor Co. v. United States, 372 U.S. 253 (1963)).

* An earlier draft of this comment was entered in the Nathan Burkan Memorial Competition.

RECENT DECISIONS

JURISDICTION—MOOTNESS—PUTATIVE CLASS ACTION NOT MOOTED BY TERMINATION OF NAMED PLAINTIFF'S SUBSTANTIVE CLAIM

Respondent[1] brought a class action[2] alleging that the Parole Release Guidelines[3] adopted by petitioner[4] were inconsistent with the Parole Commission Reorganization Act[5] and the United States Constitution. Respondent also questioned petitioner's procedures in applying the guidelines to his particular case.[6] He moved to certify a class consisting of all federal prisoners who were then or would later become eligible for parole.[7] The district court[8] denied this motion and granted summary judgment for petitioner.[9] Respondent appealed both the denial of certification and the summary judgment, but before his appeal was heard he was released from prison.[10] Petitioner then moved to dismiss respondent's appeal as moot.[11] The United States Court of Appeals for the Third Circuit ruled that the denial of class certification was erroneous,[12] and that the claims of the unnamed members could survive the mooting of the claims of the named plaintiff.[13] The United States Supreme Court, on writ of certiorari, *held*, affirmed.[14] A putative class action is not rendered moot by the termination of the named plaintiff's claim, even when class certification has been denied, since plaintiff's personal stake in obtaining class certification is sufficient to appeal its denial.[15] *United States Parole Commission v. Geraghty*, 100 S. Ct. 1202 (1980).

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[1] John M. Geraghty was convicted of conspiracy to commit extortion and of making false declarations to a grand jury. United States Parole Comm'n v. Geraghty, 100 S. Ct. 1202, 1206 (1980).

[2] The class action is authorized by rule 23 of the Federal Rules of Civil Procedure. It permits a plaintiff to bring an action on behalf of himself and others without necessitating the joinder of the others. The prerequisites to the bringing of a rule 23 class action are that the class be so numerous that joinder is impractical, that there be questions of law or fact common to the class, that the named plaintiff's claims or defenses be typical of those of the class, and that the named plaintiffs be able to protect adequately the interests of the class. FED. R. CIV. P. 23(a). *See generally* Kane, *Standing, Mootness, and Federal Rule 23—Balancing Perspectives*, 26 BUFFALO L. REV. 83, 91 (1976) (class action prevents sheer numbers from precluding the assertion of legal rights).

[3] 28 C.F.R. § 2.20 (1979).

[4] The United States Parole Commission was created by Congress to promulgate the rules under which prisoners may be considered for parole. The Commission must, using several factors, determine that release of an inmate would be in the best interest of the public. 100 S. Ct. at 1206.

[5] 18 U.S.C. §§ 4201-4218 (1976).

[6] Respondent claimed that the guidelines were facially unconstitutional because they gave the Parole Commission the power to make sentence duration decisions, and thus impose punishment without due process of law. Geraghty v. United States Parole Comm'n, 429 F. Supp. 737, 741 (M.D. Pa. 1977), *rev'd and remanded*, 579 F.2d 238 (3d Cir. 1978), *aff'd in part, vacated and remanded in part*, 100 S. Ct. 1202 (1980).

[7] 100 S. Ct. at 1206.

[8] Respondent brought his action in the United States District Court for the District of Columbia, at which time he moved for class certification. Without ruling on that motion, the court transferred the case to the Middle District of Pennsylvania, the site of respondent's incarceration. *Id.*

[9] *Id.* at 1207.

A case becomes moot when there is no longer an actual controversy or adverse relationship between the plaintiff and defendant.[16] This situation may arise in several different ways. The lawsuit may be one in which, from its inception, the parties have been in collusion,[17] or subsequent events may have rendered an originally viable controversy moot.[18] When questions of law for which a plaintiff seeks a decision are hypothetical, with no basis in fact, a court may not review them.[19] Finally, events intervening between the commencement of the action and the time of actual adjudication or review may make the granting of relief impossible.[20]

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[10] *Id.* Shortly after the appeal was filed, another prisoner, Becher, who had been denied parole in circumstances similar to respondent's, moved to intervene. The district court, on the ground that respondent's appeal had ended its jurisdiction over the case, denied this motion and Becher appealed the denial. The appeals of Becher and the respondent were consolidated. *Id.*

[11] *Id.*

[12] 579 F.2d at 244.

[13] *Id.* at 252.

[14] 100 S. Ct. at 1212.

[15] *Id.*

[16] Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850); *see, e.g.*, Muskrat v. United States, 219 U.S. 346, 357 (1911) (court may only decide cases adversarily presented).

[17] Lord v. Veazie, 49 U.S. (8 How.) 251, 255 (1850); *see* Coxe v. Phillips, 95 Eng. Rep. 152, 152 (K.B. 1736) (parties in collusion to make a third party responsible for a debt).

[18] This may occur either by a change in the controlling law or by a change in the controlling fact situation. A change by statute, treaty, or judicial decision will generally moot the case. *See* Pennsylvania v. Wheeling & Belmont Bridge Co., 59 U.S. (18 How.) 421, 436 (1855) (congressional statute); *cf.* Dinsmore v. Southern Express Co., 183 U.S. 115, 120-21 (1901) (amended statute operated to grant plaintiff relief and thus moot the case). A change in the fact situation, either through passage of time, sale of the subject property, or performance of the act requested, may make the relief sought impossible for the court to grant. *See* Atherton Mills v. Johnson, 259 U.S. 13, 15-16 (1922) (child challenging the validity of child labor statute reached majority); Security Mut. Life Ins. Co. v. Prewitt, 200 U.S. 446, 449 (1906) (action seeking revocation of a license mooted by the expiration of that license). For a more complete discussion, see Diamond, *Federal Jurisdiction to Decide Moot Cases*, 94 U. PA. L. REV. 125, 132-35 (1945) (a change in a law

The early English concept of mootness was articulated by the judiciary, which ruled in 1736 that an attempt to utilize the subterfuge of a hypothetical lawsuit constituted a contempt of court.[21] In the United States, the rationale used originally by the Supreme Court to explain its refusal to hear a moot case was the common law doctrine that courts cannot decide a question in the abstract or in the absence of a true dispute.[22] More recently, however, the Court has relied on Article III, section two of the United States Constitution, which requires that there be a case or controversy[23] in the constitutional sense before a ruling on the merits may be obtained.[24] When this requirement is not met, the court has no jurisdiction and cannot decide the case.[25] Like all

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may moot the case or a change in facts may deny relief).

[19] *E.g.*, Willing v. Chicago Auditorium Ass'n, 277 U.S. 274, 289-90 (1928) (lessor sought a court interpretation of a term in a lease); Hayburn's Case, 2 U.S. (2 Dall.) 409, 409 (1796) (attorney general sought a writ of mandamus in the name of a fictitious person to compel congressional action).

[20] *E.g.*, Mills v. Green, 159 U.S. 651, 657-58 (1895) (citizen's action to compel clerk to register him as a qualified voter mooted by the passing of the election).

[21] Coxe v. Phillips, 95 Eng. Rep. 152 (K.B. 1736); *accord*, *In re* Elsam, 107 Eng. Rep. 855, 856 (K.B. 1824) (attorney fined for contempt); Hoskins v. Berkely, 100 Eng. Rep. 1086, 1086 (K.B. 1791)(dictum).

[22] Note, *The Mootness Doctrine in the Supreme Court*, 88 HARV. L. REV. 373, 374 (1975); *see* Mills v. Green, 159 U.S. 651, 653 (1895) (courts must decide actual controversies); California v. San Pablo & T. R.R., 149 U.S. 308, 314 (1893) (courts may not decide moot questions). *See generally* Diamond, *supra* note 18, at 125 (court may not render a decision in a moot case).

[23] Note, *supra* note 22, at 374-75. The case or controversy requirement has been cited by the Supreme Court to explain its refusal to render a judgment in a collusive suit or a moot case, as well as its refusal to issue advisory opinions or answer political questions. 41 HARV. L. REV. 232, 232-33 (1927). The essential element of a case or controversy is "interested parties asserting adverse claims." *Id.* at 233. *See also* Diamond, *supra* note 18, at 125-26 (a lawsuit which is moot cannot satisfy the case or controversy requirement).

[24] In order for the controversy to be "justiciable," as distinguished from a hypothetical or moot difference of opinion, it must be definite and concrete, and be between two adverse parties. Bledsoe, *Mootness and Standing in Class Actions*, 1 FLA. ST. U.L. REV. 430, 431 (1973). The Court first expressly relied on Article III as a basis for not ruling on moot cases in Liner v. Jafco, 375 U.S. 301, 306 n.3 (1964), but gave no reason for its reliance. The Court has, however, relied on Article III without comment in its subsequent decisions. For more examples of this trend, see Note, *supra* note 22, at 375 n.12.

[25] *E.g.*, DeFunis v. Odegaard, 416 U.S. 312, 317 (1974) (the requirement of controversy was not met where plaintiff who had previously been denied admission to law

general rules, however, the doctrine of mootness is subject to exceptions. While a viable controversy usually means a present controversy, there are situations in which a court will grant relief even when factors have intervened that would ordinarily render the case moot.[26] The Supreme Court has devised two tests under which the maintainability of a suit may be preserved.[27] The first of these was articulated by the Court in *Southern Pacific Terminal Co. v. I.C.C.*[28] Under this test, if a dispute which is claimed by the defendant to have become moot is "capable of repetition, yet evading review,"[29] the court may retain jurisdiction in order to rule on the merits of the case.[30] The second test, the "mere possibility" test, was delineated in *United States v. W. T. Grant Co.*,[31] in which the Court noted that voluntary cessation of the defendant's conduct would not render the case moot if there was a reasonable expectation that the wrong complained of would be repeated.[32]

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school was subsequently admitted); North Carolina v. Rice, 404 U.S. 244, 246 (1974) (court's inability to review moot cases comes from Article III of the Constitution). *See generally* C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3533 (1975) (suit must be viable at all stages); Diamond, *supra* note 18, at 125 (mootness is a jurisdictional limitation). The case or controversy requirement serves two important functions: it prevents the needless expenditure of limited judicial resources, and, more importantly, it assures that all lawsuits are conducted in a true adversarial context. Note, *Does Mooting of the Named Plaintiff Moot a Class Suit Commenced Pursuant to Rule 23 of the Federal Rules of Civil Procedure*? 8 VAL. U.L. REV. 333, 335-36 (1973).

[26] Bledsoe, *supra* note 24, at 434.

[27] *Id.*

[28] 219 U.S. 498 (1911).

[29] *Id.* at 515. This case dealt with short term orders, issued by the Interstate Commerce Commission, which would usually expire before any one litigant could bring a suit to completion. The Court reasoned that the plaintiff's rights were being regulated by a commission that very possibly would never have to answer for its acts if the expiration of each order rendered each successive case moot. *Accord*, Moore v. Ogilvie, 394 U.S. 814, 816 (1969) (dispute involving nomination procedure held not mooted, although election was completed, because the dispute would arise again at the time of the next election).

[30] This concept has been used in a wide variety of cases to enable the Court to remedy a recurring wrong. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 774 (1978) (various corporations allowed to continue to litigate a statutory ban on advertising in referendum elections even though the election had been completed); United States v. New York Tel. Co., 434 U.S. 159, 165 n.6 (1977) (litigation involving an F.B.I. wiretap order allowed to continue although the wiretap operation itself had ceased); Super Tire Eng'r Co. v. McCorkle, 416 U.S. 115, 125 (1974) (employer sought to have striking employees removed from unemployment rolls; action not mooted by end of strike since there was likelihood of recurrence); *cf.* Weinstein v. Bradford, 423 U.S. 147, 148 (1975) (court recognized doctrine, but stated that the threatened recurrence must be to the plaintiff himself, not to a hypothetical third person).

[31] 345 U.S. 629 (1953).

[32] *Id.* at 632-33. The test is based on the fact that, in the absence of any restrictions,

However, a mere possibility of recurrence is not enough; there must be an apparent danger of the violation's recurrence.[33] Additionally, even when the major claim or point of contention has disappeared,[34] any remaining claims enable the court to retain jurisdiction.[35]

The class action,[36] a suit brought by one or more persons suing on his own or their behalf and on behalf of other persons who have similar grievances,[37] presents unique mootness problems. Since a class action

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the defendant is free to resume the offending practice, notwithstanding his assertions of good faith. The Court looked to the facts surrounding the case to see if the defendant retained control sufficient to make it likely that the challenged conduct would be repeated. *Id.* at 633. Like the first test, the second test is applicable only between the same plaintiff and defendant. *Id.* at 632. *See* Bledsoe, *supra* note 24, at 434-36 (possible bad faith of defendant may cause "mere possibility" test to be invoked).

[33] 345 U.S. at 633.

[34] *See* note 18 *supra.*

[35] *See* Powell v. McCormick, 395 U.S. 486 (1969). Congressman Adam Clayton Powell claimed that the 90th Congress had unconstitutionally denied him his seat in the House of Representatives and included in his action a claim for back salary. He had been the object of an investigation into certain questionable spending practices of the Committee on Education and Labor, of which he was chairman. It was determined that he and others had received improper travel expenses and that his wife was receiving illegal salary payments. He was stripped of his seat in the House. *Id.* at 489-93. The defendants contended that the 90th Congress was not a "continuing body," *id.* at 495, and that its termination and Powell's subsequent seating by the 91st Congress had mooted his constitutional claim, thus mooting the case. However, the Court found that the additional claim of back salary was still very much in dispute. This dispute provided the required case or controversy, *id.* at 496-97, and allowed the Court to reach the constitutional issue that would otherwise have been moot. *See, e.g.*, Roudebush v. Hartke, 405 U.S. 15, 19 (1972) (Senator Hartke conditionally seated by Senate after a disputed election; did not moot the controversy since his seating was conditional on the results of court action and a recount). The Court has been willing to hear cases in which the collateral dispute was more speculative. *See* Note, *supra* note 22, at 379 (continuing adverse effect on the plaintiff necessary).

[36] *See* note 2 *supra.* For an exhaustive discussion of a class action, see *Developments in the Law—Class Actions*, 89 HARV. L. REV. 1318 (1976).

[37] The class action originated in the English court of chancery, Note, *supra* note 25, at 336 n.20, as a method of circumventing the requirement of the law courts that each action be brought separately. *See* Z. CHAFEE, SOME PROBLEMS OF EQUITY 201 (1950). Although such an action was undeniably more convenient, it conflicted with well-established legal principles, chief among them the requirement that each man have his day in court. *Id.* at 203. The court in Cockburn v. Thompson, 33 Eng. Rep. 1005, 1005 (Ch. 1809), neatly sidestepped this hurdle with its observation that where it is practically impossible to bring all interested parties before the court, convenience dictates a different policy. The courts in the United States followed the English policy of allowing the class action, but first allowed it only in equity. Note, *supra* note 25, at 336 n.20. However, when the distinction between law and equity was removed by the Federal Rules of Civil Procedure, the class action became available in actions at law as well. *Id.* For a

is composed of many individual controversies, there is always the possibility that at least one of them will become moot.[38] In a normal two-party suit, mootness would require dismissal of the proceeding.[39] However, the courts have found on occasion that the class action can survive the demise of the named plaintiff's claim. As the courts have tended to treat moot class actions somewhat differently, it is helpful to divide them into three categories.[40] (1) The entire class may have its claims mooted, necessarily mooting the entire action[41] since there is no

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more thorough discussion of the early history and development of the class action, see Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977).

The class action should be distinguished from the public interest action. While each is a private suit in the public interest, the class action is premised on the theory that all persons with an interest in the litigation are before the court. The public interest action, however, does not resort to that fiction. The plaintiff represents only himself, but speaks for the general public. Perhaps the most significant difference between the two forms of action is that the class action plaintiff must show a violation of a substantive, legally protected individual right, while the public action plaintiff may rely on the interest of the public at large. Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 387-88 (1974). This difference makes the question of standing to sue a most important one in the area of public interest litigation. The earlier doctrine was that the plaintiff had to show that the defendant's conduct had deprived him of a legally protected right. *See, e.g.*, Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 693 (1949) (in order to have standing to challenge constitutionality, the plaintiff must show a legal right); Stark v. Wickard, 321 U.S. 288, 290 (1944) (tenant farmers had a legal right under Agricultural Marketing Agreement Act); Perkins v. Lukens Steel Co., 310 U.S. 113, 125 (1940) (in order to have standing, must show a legal right granted by constitutional legislation); Tennessee Elec. Power Co. v. T.V.A., 306 U.S. 118, 137 (1939) (right must be legally protected, contractual, statutory, or other). However, the Court has, in recent years, turned more toward protecting the general public interest and allowed the plaintiff more latitude in the area of standing in order to enable valid grievances to be heard. *See, e.g.*, FCC v. Sanders Bros. Radio Station, 309 U.S. 470, 476-77 (1940) (owners of a radio station had standing to protect the public interest in adequate radio service); *cf.* Barlow v. Collins, 397 U.S. 159, 164-65 (1970) (tenant farmers allowed to challenge an act of the Secretary of Agriculture); Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150, 155-56 (1970) (competitors of national banks permitted to sue under Administrative Procedure Act). *See generally* Homburger, *supra*, at 390-93 (court uses public interest as criterion in standing questions); Kane, *supra* note 2, at 90-91 (class action functioning as a public interest suit).

[38] Comment, *A Search for Principles of Mootness in the Federal Courts* (pt. 2), 54 TEX. L. REV. 1289, 1320 (1976).

[39] *E.g.*, Brockington v. Rhodes, 396 U.S. 41, 43 (1969) (plaintiff who protested candidate certification requirement had case mooted by election).

[40] This approach is suggested in Comment, *supra* note 38, at 1320. These are all the possible permutations of the problem of mootness, though the categories are rather large.

[41] *E.g.*, Hall v. Beals, 396 U.S. 45, 48 (1969). In this case plaintiffs brought a class

remaining basis for jurisdiction. (2) The claims of some of the named plaintiffs may become moot, with others remaining viable. In this situation, the court retains jurisdiction[42] since there is still an adversary relationship. Those whose claims have been mooted simply do not remain as parties. (3) Finally, the claims of all named plaintiffs may become moot, but those of all or most of the members of the class remain.[43] It is in this third situation that the doctrine of mootness becomes the most difficult to apply.[44]

The courts, prior to 1975, generally held that the mooting of the named plaintiff's claim did not render the action itself moot, but these decisions provided little or no explanation of how or why they had been reached.[45] However, without using formal guidelines, the courts seemed to follow either of two views in deciding the question of mootness.[46] The first view required the named plaintiff to have a stake in the outcome of the case.[47] Strict adherence to this view caused many class actions to be dismissed upon the mooting of the named plaintiff's claim or a finding that the named plaintiff had never belonged to the class.[48] The second view was that a personal stake on the part of the

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action challenging a state's six month durational residency requirement for voting. By the time the case reached the Supreme Court, the national election had been held, and in addition the residency requirement had been reduced to two months. The Court dismissed the suit as moot, reasoning that the original requirement, which was the subject matter of the suit, was nonexistent, and also that the plaintiffs, never having been affected by the new requirement, had suffered no injury.

[42] Comment, *supra* note 38, at 1321. The author points out that this constitutes only a misjoinder problem. *See, e.g.*, Goosby v. Osser, 409 U.S. 512, 514 n.2 (1973) (one defendant to the suit admitted that plaintiffs were due the relief that they requested, but other defendants vigorously denied the fact).

[43] Comment, *supra* note 38, at 1321.

[44] *Id.* Prior to 1975, the Supreme Court had not taken a definitive position on the proper disposition of a case in which the named plaintiff had lost his cause of action. When faced with the opportunity to do so in Indiana Employment Security Div. v. Burney, 409 U.S. 540, 541-42 (1973), the Court instead vacated and remanded the case so that the lower court could decide the issue of mootness. Since *Burney* involved the defendant's mooting the case by voluntarily meeting the named plaintiff's demands, it appeared that the Court gave its tacit approval of that practice. *But see* Deposit Guar. Nat'l Bank v. Roper, 100 S. Ct. 1166, 1174 (1980) (Court expressly rejected this idea). *See generally* Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 581-82 (discussion of inconsistencies of lower court decisions during this time).

[45] Kane, *supra* note 2, at 100.

[46] *See* Comment, *supra* note 44, at 583.

[47] *Id.*

[48] *See, e.g.*, McCabe v. Atchison, T. & S.F. Ry., 235 U.S. 151, 163-64 (1914) (plaintiffs failed to allege facts sufficient to show that they had suffered any injury). It is im-

named plaintiff was unnecessary to enable the class action to continue.[49] This latter view was more prevalent, but there was no firm articulation of guidelines to be followed in making this important determination. In 1975, the Supreme Court, in *Sosna v. Iowa*,[50] clarified the matter when it held that after class certification, the unnamed parties acquired a legal status separate from that of the named plaintiff.[51] In *Sosna*, the plaintiff questioned the constitutionality of Iowa's one year residency requirement for divorce proceedings.[52] She brought her suit in the form of a class action on behalf of herself and all others whose desire to obtain a divorce was frustrated by the one year requirement.[53] By the time the case reached the Supreme Court, the named plaintiff had satisfied the requirement,[54] but the Court determined that the practical effect of a dismissal on mootness grounds would be to cripple this type of class action.[55] The fact that other class members would be

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portant to note that in almost all instances in which a class action was found to be mooted, the intervening event that rendered it moot occurred before the putative class was certified. *See, e.g.*, Watkins v. Chicago Hous. Auth., 406 F.2d 1234, 1237 (7th Cir. 1969) (named plaintiff's claim mooted prior to certification, court could not find an unnamed plaintiff with a like injury). At least one court dismissed as moot an action in which there had been a class certification and adjudication at the trial level, but the named plaintiff's claim had been mooted during the appellate process. Norman v. Connecticut State Bd. of Parole, 458 F.2d 497, 499 (2d Cir. 1972). *See generally* Bledsoe, *supra* note 24, at 439-40 (discussion of similar cases); Comment, *supra* note 44, at 584-86 (justifications for following this procedure).

[49] Kane, *supra* note 2, at 100; *see, e.g.*, Richardson v. Ramirez, 418 U.S. 24, 40 (1974) (continuing controversy between unnamed class members and defendant showed that the case was still viable). This view allows the named plaintiff to continue to represent the class in the litigation as though his personal stake in the outcome were still intact. *See* Moss v. Lane Co., 471 F.2d 853, 855 (4th Cir. 1973) (if plaintiff was a member of the class at the beginning of the suit, and was approved as a representative, then the subsequent mooting of his claim will not end his right to litigate the case); Jenkins v. United Gas Corp., 400 F.2d 28, 33 (5th Cir. 1968) (because of possibility that defendant would voluntarily moot plaintiff's claim, this mootness would not affect the claims of unnamed plaintiffs). *See also* Comment, *supra* note 44, at 590 (loss of named plaintiff's personal claim should not affect class action); Note, *supra* note 22, at 390-92 (discussion of *Ramirez*).

[50] 419 U.S. 393 (1975).

[51] *Id.* at 399. This was the Court's first intimation that the unnamed parties had some inchoate rights of their own.

[52] *Id.* at 395-96.

[53] *Id.* at 397.

[54] *Id.* at 398. Although, by the time of this appeal, plaintiff had resided in Iowa long enough to satisfy the requirement, she had previously traveled to another state and was granted a divorce. Either would have mooted the action with regard to the named plaintiff. *Id.* at n.7.

[55] *Id.* at 401 n.9. The Court based its holding that the case was not moot on two

bound by the judgment was recognized by the Court and played an important part in the ruling.[56] However, the Court placed a premium on proper class certification, as evidenced by its decision only one month later in *Board of School Commissioners v. Jacobs*.[57] This case was a class action by high school students questioning the constitutionality of school board regulations affecting a high school newspaper. The Court, in holding that the case was rendered moot by the graduation of the named plaintiffs,[58] stressed the insufficiency of certification by the district court.[59]

In 1976, the Court followed its holding in *Sosna* with the ruling in *Franks v. Bowman Transportation Co.*[60] that a properly certified class action would not be mooted by the mooting of the named plaintiff's claim, so long as an adversary relationship remained.[61] The named plaintiff in *Bowman* alleged racially discriminatory hiring practices.[62] However, prior to final adjudication by the district court, he was hired[63] and his personal claim became moot. The Supreme Court held that the personal stake of the unnamed class members enabled the action to survive.[64] The following year, in *United Airlines, Inc. v. McDonald*,[65] the Court addressed the problem caused by a denial of class certification and the subsequent mooting of the named plaintiffs' claim

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factors. First, despite the mootness of the named plaintiff's claim, there was still a live controversy between the defendant and other class members; and second, this case fell under the "capable of repetition, yet evading review" doctrine with regard to the other class members. *Id.* at 399-400. This represented a continuation of the judicial trend toward applying that doctrine to class actions. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975) (named plaintiffs were prisoners challenging the constitutionality of pretrial detention; their subsequent conviction mooted the case as to them, but not as to other prisoners); Dunn v. Blumstein, 405 U.S. 330, 333 n.2 (1972) (plaintiff satisfied three month residency requirement for voting, but other class members still affected); Bower v. Vaughan, 313 F. Supp. 37, 40 (D. Ariz. 1970) (regulation would not affect plaintiff again, but would affect other members of the class), *aff'd mem.*, 400 U.S. 884 (1970).

[56] 419 U.S. at 399.

[57] 420 U.S. 128 (1975).

[58] *Id.* at 129. The majority was silent, however, on the question of the effect that the school's policy would have on future publications.

[59] *Id.* The lower court had not identified or described the class.

[60] 424 U.S. 747 (1976).

[61] *Id.* at 754-55. In *Bowman*, the Court found that the class was properly certified, thus distinguishing it from *Jacobs*. *See* notes 57 through 59 and accompanying text *supra*.

[62] 424 U.S. at 750-51.

[63] *Id.* at 752.

[64] *Id.* at 755.

[65] 432 U.S. 385 (1977).

by a favorable judgment on the merits.[66] After the entry of judgment, one of the putative class members moved to appeal the denial of class status,[67] and the Court affirmed her right to do so.[68] Thus the Court, at least partially, removed the requirement of class certification as a prerequisite to appeal after the case has become moot with regard to the named plaintiff.

In *Deposit Guaranty National Bank v. Roper*,[69] the Supreme Court extended the *McDonald* right to appeal the denial of certification to named plaintiffs who had prevailed on the merits of their case. The plaintiffs in *Roper* brought a class action alleging usurious finance charges on the part of the defendant bank,[70] but the district court refused to certify the class.[71] The defendant then tendered to the plaintiffs the maximum amount recoverable, and the district court, over plaintiffs' objections, entered a judgment in their favor.[72] When the named plaintiffs appealed the denial of class certification, the bank contended that the case was mooted by the entry of judgment.[73] The Supreme Court held that the entry of judgment over the named plaintiffs' objections did not moot their private cause of action since they retained an individual interest in the litigation, and they were allowed to appeal the denial of class certification.[74]

In the instant case, the Court reasoned that since the named plaintiff's class action actually consisted of two issues, the substantive claim and the certification claim,[75] the mooting of the substantive claim would not automatically render the entire action moot.[76] Since rule 23 of the Federal Rules of Civil Procedure gives the named plaintiff a right to class certification if all requirements are met,[77] the Court reasoned that he could maintain an appeal of its denial if he retained a personal stake in the outcome of the action.[78] The Court then stated that the purpose of the personal stake requirement is to assure that the action is in a form that is capable of judicial resolution,[79] and the requirements of such a form are that there be real, factual issues vigorously argued by opposing parties. Since the named plaintiff fulfilled these requirements, the personal stake requirement was satisfied, though not in its traditional meaning.[80] The Court concluded that since the named plaintiff possessed a sufficient personal stake in the action, the mooting of his substantive claim did not prevent his obtaining an appeal on the class certification issue.[81]

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[66] *Id.* at 388-89.

[67] *Id.* at 390. The named plaintiffs had attempted an interlocutory appeal of the denial of certification, but the court of appeals denied their motion. Upon entry of judgment in their favor, they ceased to litigate. The Court allowed the unnamed plaintiff to intervene after judgment to appeal the denial of certification. *Id.* at 395.

[68] *Id.* at 395.

[69] 100 S. Ct. 1166 (1980).

[70] *Id.* at 1168.

[71] *Id.* at 1169.

[72] *Id.* The entry of judgment was based on defendant's tender.

[73] *Id.*

[74] *Id.* at 1174-75. The Court found the required individual interest in the plaintiffs' desire to share the costs of litigation with the putative class. *Id.* at 1173-74. For a further analysis of *Roper*, see Note, *Can Defendants Use Mootness Doctrine To Buy Off Class Actions?*, 36 WASH. & LEE L. REV. 167 (1979).

[75] United States Parole Comm'n v. Geraghty, 100 S. Ct. 1202, 1211 (1980).

[76] *Id.* at 1211.

[77] *Id.* at 1212. The Court stated that "[t]his 'right' is more analogous to the private

Justice Powell, writing for the dissent,[82] agreed that there was indeed a viable, justiciable issue,[83] but, since the named plaintiff had no true interest of his own at stake, he should be barred from litigating the action.[84] He emphasized that since the "right" embodied in rule 23[85] is only a procedural claim,[86] which is not a "claim" in the ordinary sense, the plaintiff could not assert a personal interest in it; it was insufficient to confer jurisdiction upon the Court when there was no true

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attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." *Id.* The dissent pointed out that prior to the instant case, the Court consistently had rejected any opportunity to endorse "public actions." *Id.* at 1222 (Powell, J., dissenting). The extent to which the court will allow the private attorney general concept to supplant the traditional requirement of a "personal stake" remains unclear. In Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978), *vacated and remanded*, 100 S. Ct. 1334 (1980), *remanded*, 634 F.2d 231 (5th Cir. 1981), the Fifth Circuit ruled that because the named plaintiff in a putative class action had never been a member of the putative class she lacked the requisite nexus with the class. Although that ruling would not seem to clash with the holding in the instant case, the Supreme Court vacated and remanded for further consideration in light of *Geraghty* and *Roper*. On remand, the Fifth Circuit concluded that the record in the case did not allow it to determine whether a "live and continuing controversy" existed and remanded the case to the district court. 634 F.2d at 231.

[78] 100 S. Ct. at 1211.

[79] *Id.* at 1212.

[80] *Id.*

[81] *Id.*

[82] Chief Justice Burger, Justice Rehnquist, and Justice Stewart joined in the dissent.

[83] 100 S. Ct. at 1215.

[84] *Id.*

[85] *See* note 77 *supra.*

[86] Justice Powell contended that a procedural right could come into play only after the Court has established that it has jurisdiction. It could not be used to give the Court jurisdiction. 100 S. Ct. at 1221-22.

Article III case or controversy, but only a lively dispute.[87]

The instant decision is significant because of the unprecedented lengths to which the Court appears willing to go to find the requisite "personal stake" necessary to keep the action alive. While previous cases had, with varying degrees of rigidity, required the named plaintiff to have some tangible personal interest in the outcome of the action[88] or, alternatively, required a valid certification of an identifiable class,[89] the instant case required only a continuing controversy over some aspect of the litigation.[90] The Court reached this conclusion only after a tortuous circumnavigation of the doctrine of mootness. After unearthing a "right" to a class action, the majority determined that a procedural claim, if it is vigorously contested, can fulfill the personal stake requirement by satisfying what the Court found to be the purpose of the requirement, which is to present justiciable disputes.[91] By allowing this to suffice, however, the Court seems to obviate the requirement itself. As a practical matter, only rarely would a named plaintiff whose substantive claim was mooted be unable to meet the Court's nontraditional approach to the personal interest test, since by appealing the denial of certification he can satisfy the vigorous advocacy criterion.

Although the Court attempted to equate the personal interest in the instant case with that found in *Roper*,[92] the two differ in one important respect. *Roper* relied on a financial interest of the named plaintiffs,[93] which is clearly distinguishable from the elusive personal stake discerned in *Geraghty*. Perhaps the instant approach would have been more palatable had it been articulated in a case with a fact situation like that in *Gerstein v. Pugh*,[94] in which there was more clearly a continuing adverse relationship.[95] However, notwithstanding the serpentine reasoning employed, the decision in the instant case will probably be a helpful step in the quest for judicial economy, since it is more likely that an action already in progress will be allowed to proceed. The Article III case or controversy requirement, though bruised, emerged intact since the plaintiff must demonstrate at the outset that he has suffered some real injury and that he does in fact represent a class that has suffered like injury.[96]

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[87] *Id.* at 1222 n.16.

[88] *See* notes 47, 48 and accompanying text *supra*.

[89] *See* notes 50 through 59 and accompanying text *supra*.

[90] 100 S. Ct. at 1212. It is this point that the dissent found particularly objectionable. *Id.* at 1222. *See* text accompanying notes 85 through 87 *supra*.

[91] *See* text accompanying notes 77 through 80 *supra*.

[92] 100 S. Ct. at 1211.

[93] *See* note 74 *supra*.

[94] 420 U.S. 103 (1975); *see* note 55 *supra*.

[95] Though the named plaintiffs' claim had become moot, their attorney was a public defender, who represented other class members. 420 U.S. at 110 n.11. The continuing controversy there would have fit more symmetrically, and plausibly, into the Court's reasoning.

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[96] *See* note 48 *supra*. *But see* note 77 *supra*. The instant decision seems to find its justification in the fact that the named plaintiff did, at one time, have a nexus with the putative class. The thrust of the majority opinion was that the subsequent mooting of the named plaintiff's claim was no bar to his continued representation of the interests of the class. Nowhere in the opinion did the majority intimate a further withdrawal from this position. Nevertheless, by vacating and remanding *Satterwhite*, the Court may be hinting at even more relaxed requirements for class representation, using the instant decision as a springboard.

CONSTITUTIONAL LAW—JURISDICTION—TO BE SUBJECT TO FORUM STATE'S PERSONAL JURISDICTION FOREIGN CORPORATION MUST REASONABLY EXPECT TO DEFEND SUIT

Petitioners[1] sought a writ of prohibition to restrain the district court[2] from exercising in personam jurisdiction over them in a products liability suit brought by respondents[3] in state court. Respondents alleged that their injuries were caused by a defect in the design and placement of their car's fuel system and brought suit[4] under Oklahoma's long arm statute.[5] Petitioners, both New York corporations, contended that their rights under the due process clause of the fourteenth amendment[6] had been violated because they did not do business in or have minimum contacts[7] with Oklahoma. The district court held that the constitutional rights of the petitioners had not been violated.[8] On appeal, the Supreme Court of Oklahoma affirmed the district court decision and refused to issue a writ of prohibition.[9] On writ of certiorari the United States Supreme Court, *held,* reversed. To be subject to in personam jurisdiction, a foreign corporation must reasonably expect to defend a suit in the forum state. *World-Wide Volkswagen Corp. v. Woodson,* 100 S. Ct. 559 (1980).

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[1] Petitioner World-Wide Volkswagen Corporation is a regional distributor of Audi vehicles, parts, and accessories and serves retail dealers in New York, Connecticut, and New Jersey. Petitioner Seaway Volkswagen, Inc., is a retail dealer selling Audi vehicles, parts, and accessories in Massena, New York. World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 562-63 (1980).

[2] Respondent Charles S. Woodson is the district judge for Creek County, Oklahoma where this action originated. *Id.* at 562-63.

[3] This suit arose out of a wreck in Oklahoma in which respondents Kay and Harry Robinson were involved. Respondents' Audi, purchased from Seaway, was hit from the rear and burst into flames. Kay Robinson and her two children were injured severely in the ensuing fire. *Id.* at 562. Kay Robinson sued to recover for her personal injuries, and Harry Robinson sued as father and next friend for recovery for the injuries to his children. *Id.* at 562 n.2.

[4] Joined as defendants were the car's manufacturer, Audi NSU Auto Union Aktiengesellschaft; its importer, Volkswagen of America, Inc.; and petitioners World-Wide and Seaway. *Id.* at 562. *See* note 1 *supra.*

[5] The Oklahoma statute provides that:

> A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action or claim for relief arising from the person's . . . causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this state . . . .

OKLA. STAT. tit. 12, § 1701.03(a)(4) (Supp. 1979-1980).

[6] U.S. CONST. amend. XIV, § 1.

[7] The requirement of minimum contacts with a state serves both to prevent the possibility of litigation in an inconvenient forum and to ensure that state courts do not interfere with the authority of other state court systems. 100 S. Ct. at 564. For a further discussion, see notes 38 through 44 and accompanying text *infra.*

Under the due process clause of the fourteenth amendment,[10] a state court cannot render a valid judgment unless the court has proper in personam jurisdiction[11] over the parties to the suit.[12] At common law, in the absence of consent by the defendant,[13] jurisdiction could be obtained only if the defendant was within the boundaries of the sovereign.[14] This physical power theory[15] was relied on in *Pennoyer v.*

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[8] 100 S. Ct. at 563.

[9] 585 P.2d 351 (Okla. 1978), *rev'd,* 100 S. Ct. 559 (1980).

[10] U.S. CONST. amend. XIV, § 1.

[11] Traditionally there have been three types of judgments: (1) in personam; (2) in rem; and (3) quasi in rem. A judgment in personam imposes a personal obligation on an individual and is based on the court's power over the defendant. A judgment in rem is a judgment rendered against property over which the court has power. Questions of ownership are not involved, and the court may not have power over all parties having an interest in the property. A quasi in rem judgment determines the ownership of the property at issue. RESTATEMENT OF JUDGMENTS, introduction, at 5-8 (1942).

[12] *See, e.g.,* Kulko v. Superior Court, 436 U.S. 84, 101 (1978) (action by divorced father to vacate order denying motion to quash service of summons for lack of in personam jurisdiction); Pennoyer v. Neff, 95 U.S. 714, 733 (1877)(action by nonresident defendant to set aside default judgment for lack of in personam jurisdiction). For a further discussion of these cases, see notes 16 through 23, 62 through 70, and accompanying text *infra.*

[13] Since the defendant can always waive lack of in personam jurisdiction as a defense, actual consent has always been a common law basis for jurisdiction. *See generally* Note, *Developments in the Law—State Court Jurisdiction,* 73 HARV. L. REV. 909, 916 (1960).

[14] In order for early common law courts to exercise jurisdiction over unwilling parties, the parties or property in question had to be within the territory. *See, e.g.,* Emanuel v. Symon [1908] 1 K.B. 302 (1907) (C.A.) (partners in a gold mine in Australia filed suit against an ex-partner residing in England after the partnership was dissolved and a deficit was found); Singh v. Faridkote, [1894] A.C. 670 (P.C. 1894) (jurisdiction denied in a suit by the Rajah to enforce a judgment issued in plaintiff's native state against appellant, a resident of another state). *See generally* Note, *supra* note 13, at 915 (quoting J. STORY, CONFLICT OF LAWS § 539 (8th ed. 1883)) (earliest common law theory was presence which required person to be within the territory).

[15] The physical power theory required that the defendant be physically present within a state before that state's courts could assert jurisdiction. *See generally* R. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 133 (2d ed. 1980) (presence of defendant required in the absence of consent). Justice Holmes observed that "[t]he foundation of jurisdiction is physical power . . . ." McDonald v. Mabee, 243 U.S. 90, 91 (1917), *quoted*

Neff,[16] which provided the foundation for the modern law of personal jurisdiction.[17] *Pennoyer* concerned an Oregon judgment[18] against Neff, a nonresident who owned land in Oregon. Pursuant to Oregon law, Neff was given only publication notice of the suit, and a default judgment was subsequently rendered in favor of Mitchell.[19] The United States Supreme Court held that constructive service of process for in personam actions against nonresidents violated the due process clause of the fourteenth amendment.[20] Therefore, any judgment rendered without personal service would be void[21] and, as such, not entitled to full faith and credit by other states.[22] As applied to corporations, which were deemed to have legal existence only within the boundaries of the state of incorporation,[23] the physical power theory proved impractical.[24]

As corporate activity became interstate in nature, it became necessary for states to create methods of gaining personal jurisdiction over foreign corporations. The first theory to evolve was the consent theory[25] under which a foreign corporation's right to transact business

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in R. Weintraub, *supra*, at 133.

[16] 95 U.S. 714 (1877).

[17] *See* Shaffer v. Heitner, 433 U.S. 186, 198-99 (1976).

[18] Mitchell sued Neff for unpaid attorney fees, and a judgment for less than $300 was rendered. 95 U.S. at 719.

[19] *Id.* at 719-20. Neff sued to regain possession of his land after it was sold to Pennoyer to satisfy the default judgment. *Id.* at 719.

[20] *Id.* at 722. Justice Field held that a state's power to exercise jurisdiction over persons and property was limited by two "principles of public law." The first principle was "that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory." The second principle was "that no State can exercise direct jurisdiction and authority over persons or property without its territory." *Id. See* U.S. Const. amend. XIV, § 1.

[21] 95 U.S. at 733-34.

[22] "[I]n order to entitle the judgment rendered in any court of the United States to the full faith and credit mentioned in the Constitution, the court must have had jurisdiction not only of the cause, but of the parties . . . ." *Id.* at 731.

[23] *E.g.,* Paul v. Virginia, 75 U.S. (8 Wall.) 168, 181 (1868) (upholding Virginia statute requiring insurance companies to deposit a bond with the state as a condition of doing business in the state); Bank of Augusta v. Earle, 38 U.S. (13 Pet.) 519, 588 (1839) (suit in Alabama by a bank incorporated in Georgia against an Alabama citizen on bills of exchange protested for nonpayment). This principle was extended to preclude suits against corporations outside the state of their incorporation. 75 U.S. (8 Wall.) at 181.

[24] The corporation could claim that it had not consented to be sued. Additionally, the highest officer in a corporation had to be served with process in order to obtain jurisdiction over the corporation, but service had to be made within the forum state. *See* Note, *supra* note 13, at 919.

[25] In 1855, the Supreme Court approved the consent theory. Lafayette Ins. Co. v.

within the state was conditioned[26] on the corporation giving its implied or expressed[27] consent to being sued in the state.[28] Later, courts relied on the presence theory[29] to gain personal jurisdiction[30] over foreign

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French, 59 U.S. (18 How.) 404, 407 (1955) (suit in Ohio against an Indiana insurance company to collect on an insurance policy for losses by fire). This theory was last used by the Supreme Court in 1933. Washington v. Superior Court, 289 U.S. 361, 364-65 (1933) (suit instituted in Washington against a Delaware corporation after its withdrawal from the state; process served on Washington's Secretary of State).

[26] The conditions that a state could impose on a corporation could not be illegal, unconstitutional, or contrary either to the rules of "public law," *see* note 20 *supra,* which protect the jurisdictional power of one state from encroachment by other states, or the "principle of natural justice" which grants an accused the right to defend himself. Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404, 407 (1855). Specifically, a state could require a corporation, as a condition of transacting business in the state, to stipulate that, in any litigation arising out of its activities in the state, it would accept as sufficient service of process on its agents. St. Clair v. Cox, 106 U.S. 350, 356 (1882) (agent who receives service of process on behalf of a corporation must be appointed to act in the forum state). An agent may receive service of process on behalf of a corporation if he is in "such relation to the company that the State may designate him for that purpose." Commercial Mut. Accident Co. v. Davis, 213 U.S. 245, 255 (1909) (insurance company's agents who had authority to settle claims, deemed to be able to receive service of process on behalf of the company for suits connected with insurance claims); *cf.* Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928) (Secretary of State as agent for nonresidents involved in auto accident in forum state).

[27] *E.g.,* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95-97 (1917) (express authority for corporation to do business in state after the corporation appointed an agent); Simon v. Southern Ry., 236 U.S. 115, 131-32 (1915) (corporation not complying with a state's statute to appoint an agent held to have implied its consent to be sued only for suit arising in the state).

[28] As the number of automobiles increased, the number of injuries caused by automobile accidents involving out-of-state motorists also increased. It became necessary for states to have a method of gaining in personam jurisdiction over the motorists involved. Since it was assumed that these out-of-state motorists could be excluded from the state's highways, the use of the highways was deemed to imply consent by the motorist to appoint a specific state official as his agent for service of process. The agent could then be served personally within the state, thereby subjecting the out-of-state motorist to in personam jurisdiction. Shaffer v. Heitner, 433 U.S. 186, 202 (1977); *see* Hess v. Pawloski, 274 U.S. 352, 354 (1927) (upholding the constitutionality of the Massachusetts motorists consent statute).

[29] The presence theory was used for the first time as the sole basis for jurisdiction in 1914. International Harvester Co. v. Kentucky, 234 U.S. 579, 589 (1914) (antitrust suit against company having no agent in the forum state). *See generally* Note, *supra* note 13, at 921 (consent theory was not applied due to failure to serve process on the proper agent). The presence theory was used to bring International Harvester Company under the jurisdiction of Kentucky only after International Harvester was found to be doing business in Kentucky. 234 U.S. at 585. A corporation found to be present within the forum state could be sued for claims unrelated to the corporation's business within the state. Tauza v. Susquehana Coal Co., 220 N.Y. 259, 115 N.E. 915, 918 (1917) (company

corporations.[31] According to this theory, jurisdiction could be exercised only when the corporation was doing business in the state to an extent sufficient for its "presence" in that state to be inferred.[32] Courts used the consent theory or the presence theory,[33] depending on the situation, but no practical rule emerged.[34] The two theories eventually were

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soliciting orders in and shipping into New York held to be doing business within New York, and therefore present in the state). However, the presence theory could be circumvented if the corporation stopped doing business within the forum state before a suit was brought against it. In such a sitution, it was necessary to rely on the implied consent theory under which a corporation gave implied consent to be sued for all claims arising out of its business in the forum state, even if it was no longer present. Washington v. Superior Court, 289 U.S. 361, 364 (1933).

[30] While using the presence theory to deny jurisdiction in New York over a Massachusetts corporation in Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141-42 (2d Cir. 1930), Judge Hand also based his decision on considerations of reasonableness and fairness. *Id.* at 142. These same terms were later incorporated in a new standard in International Shoe Co. v. Washington, 326 U.S. 310, 317 (1945). For a further discussion, see notes 40 through 43 and accompanying text *infra.*

[31] The theory under which a corporation was deemed to have legal existence only within the boundaries of the state of incorporation was rejected by the presence theory. *See* note 23 and accompanying text *supra. See generally* Kurland, *The Supreme Court, The Due Process Clause and the In Personam Jurisdiction of State Courts—From Pennoyer to Denckla: A Review,* 25 U. Chi. L. Rev. 569, 582 (1958) (presence theory as defective as consent theory).

[32] "A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the State in such manner and to such extent as to warrant the inference that it is present there." Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264, 265 (1917) (New York resident brought suit in New York to recover for injuries incurred while working for railroad which did business only in Pennsylvania and New Jersey).

[33] *See, e.g.,* Pennsylvania Fire Ins. Co. v. Gold Issue Mining & Milling Co., 243 U.S. 93, 95-97 (consent theory); Hutchinson v. Chase & Gilbert, 45 F.2d 139, 142 (2d Cir. 1930) (presence theory).

[34] While solicitation alone was insufficient to subject a foreign corporation to in personam jurisdiction, Green v. Chicago B. & Q. Ry., 205 U.S. 530, 532-33 (1907) (solicitation in Pennsylvania of passengers and freight for railroad operating only in Illinois), solicitation plus shipment of orders into the forum state were held to be sufficient grounds for imposing in personam jurisdiction on a foreign corporation, International Harvester Co. v. Kentucky, 234 U.S. 579, 585 (1914) (solicitation and shipment of machinery). The following activities were held to be insufficient to sustain jurisdiction: several purchases of goods in the forum state by a foreign corporation for sale in the corporation's home state, Rosenberg Bros. & Co. v. Curtis Brown Co., 260 U.S. 516, 518 (1923); activities in the forum state of a company whose stock was almost entirely owned by the defendant corporation, Peterson v. Chicago, R.I. & P. Ry., 205 U.S. 364, 393-94 (1907); and use of a railroad's equipment in the forum state by connecting carriers, Philadelphia & R. Ry. v. McKibbin, 243 U.S. 264, 265 (1917). Jurisdiction over a foreign corporation was upheld where a corporation maintained an office within the forum state for the purpose of settling claims, St. Louis S.W. Ry. v. Alexander, 227 U.S. 218, 228 (1913) (New

combined into a third impractical theory that subjected any corporation "doing business" in a foreign state to that state's jurisdiction.[35]

These theories were finally rejected[36] in 1945 in the Court's decision of *International Shoe Co. v. Washington.*[37] International Shoe Company, a Delaware corporation,[38] was sued in the state of Washington for recovery of past due contributions to that state's unemployment compensation fund. International Shoe neither maintained offices nor made contracts in Washington, although its salesmen solicited sales within the state. This solicitation was held by the Supreme Court of Washington to be sufficient to constitute doing business, and the jurisdiction of the state of Washington was upheld.[39] On appeal, the United States Supreme Court held that a defendant, whether present or not within the forum state, was subject to an in personam judg-

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York action against Texas railroad company for negligence in handling of certain freight), but denied where the foreign corporation maintained an office in the forum state, but all business was consummated in the state of incorporation, Davega v. Lincoln Furniture Mfg. Co., 29 F.2d 164, 166 (2d Cir. 1928) (solicitation of furniture orders in New York by Virginia company).

[35] In 1935 the United States Supreme Court upheld the constitutionality of an Iowa statute subjecting nonresidents dealing in securities in Iowa to the state's jurisdiction. Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 628 (1935) (action against New York resident selling securities in Iowa through an agent). Under the Iowa statute, the securities business was deemed to be "exceptional" and was consequently subjected to "special regulation." Process could then be served in the forum state on any "agent or clerk" employed by the company. *Id.* at 627. *See generally* Kurland, *supra* note 31, at 584-85 (necessary to determine whether a corporation was doing business in the forum state under both the consent and presence theories).

[36] International Shoe Co. v. Washington, 326 U.S. 310, 316-17 (1945) (citing Hutchinson v. Chase & Gilbert, 45 F.2d 139, 141 (2d Cir. 1930)). In rejecting the presence theory, Chief Justice Stone stated that "the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process." 326 U.S. at 316-17. The fiction that a corporation's consent could be implied by the "acts of its authorized agents" within the forum state was similarly dismissed. *See* notes 25 and 26 *supra.* The Chief Justice stated that "more realistically it may be said that those authorized acts were of such a nature as to justify the fiction." 326 U.S. at 318-19 (citing Smolik v. Philadelphia & Reading Coal & Iron Co., 222 F. 148, 151 (S.D.N.Y. 1915) (denying a motion to set aside service of process on an agent designated by a foreign corporation to accept service pursuant to the New York code)).

[37] 326 U.S. 310 (1945).

[38] International Shoe maintained its principal place of business in St. Louis, Missouri, but had manufacturing plants in several states excluding Washington. These plants manufactured and distributed shoes and other footwear. *Id.* at 313.

[39] 22 Wash. 2d 146, 154 P.2d 801, *aff'd,* 326 U.S. 310 (1945). Notice was personally served on one of International Shoe's salesmen, and a copy was sent by registered mail to International Shoe's main office in St. Louis. 326 U.S. at 312.

ment[40] if he had certain "minimum contacts"[41] with that state.[42] The Court concluded that since the activities of International Shoe's salesmen were continuous and systematic and since the suit arose from those activities, it was reasonable[43] to require the corporation to defend the suit in Washington.[44]

In *McGee v. International Life Insurance Co.*,[45] the Supreme Court further expanded[46] the power of a state over foreign corporations by affirming California's assumption of jurisdiction over a corporation[47] that had enjoyed the state's economic benefits, even though those benefits were minimal.[48] In reaching this conclusion the Court stressed the considerable state interest in providing a forum in which the state's citizens could sue foreign corportions to enforce unpaid insurance claims.[49]

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[40] The departure from the jurisdictional concepts of *Pennoyer, see* notes 15 through 22 and accompanying text *supra,* increased the power of the forum state's courts to exercise in personam jurisdiction over out-of-state defendants. Shaffer v. Heitner, 433 U.S. 186, 204 (1976).

[41] Several factors were set forth to aid in determining if a corporation had minimum contacts with the forum state. The most important factor was whether the suit arose out of the corporation's activity in the state. The Court reasoned that:

> [T]o the extent that a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state. The exercise of that privilege may give rise to obligations, and, so far as those obligations arise out of or are connected with the activities within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue.

326 U.S. at 319. Other factors included whether the activities of the foreign corporation within the forum state were "continuous and systematic," *id.* at 317, and whether the corporation enjoyed the economic benefits of the state, *id.* at 319.

[42] The new standard set forth by the Court was "that in order to subject a defendant to a judgment *in personam,* if he be not present within the territory of the forum, he [must] have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *Id.* at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[43] After *International Shoe,* "the relationship among the defendant, the forum, and the litigation . . ." became the most important factor in determining if a foreign defendant should be subjected to the personal jurisdiction of the forum state. 433 U.S. at 204. Reasonableness was determined by comparing the inconvenience to the defendant with the plaintiff's inconvenience and the forum state's interests. The defendant's inconvenience was the main consideration since the plaintiff voluntarily submitted to the jurisdiction of the forum state by filing suit, and the state could use the principle of forum non conveniens to dismiss the suit. *See generally* Note, *supra* note 13, at 924 (balancing of interests required in determining constitutionality of assertion of jurisdiction).

[44] 326 U.S. at 320.

[45] 355 U.S. 220 (1957).

[46] Recognizing this expansion, the Court in *McGee* stated that "a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents." *Id.* at 222. *See generally* Comment, *Shaffer v. Heitner: Reshaping the Contours of State Court Jurisdiction,* 11 LOY. L.A.L. REV. 87, 93 (1977).

[47] 355 U.S. at 221-22. In 1944, a California resident purchased a life insurance policy from an Arizona corporation. This corporation's policies were subsequently assumed by

The trend toward expansion of state jurisdiction over foreign corporations[50] ended with the Court's decision in *Hanson v. Denckla.*[51] In *Hanson,* the Court ruled that a trustee's response to correspondence originating in Florida could not, by itself, satisfy the requirement of minimum contacts under *International Shoe.*[52] Forum convenience was held to be irrelevant[53] absent a purposeful availment by the defen-

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International Life, a Texas corporation with no other contacts with California. The insurance premiums were paid until the insured's death in 1950, but International Life refused to pay, claiming that the insured committed suicide. The beneficiary of the policy obtained a judgment in California against International Life. Process was served by registered mail to the defendant's principal place of business in Texas. The beneficiary sued on the judgment, but the Texas courts refused to enforce it, ruling that the California court did not have personal jurisdiction over International Life. *Id.*

[48] The Court reasoned that a suit arising out of a single contract having a "substantial connection" with the forum state was sufficient to satisfy the requirements of due process. *Id.* at 223.

[49] The Court reasoned "that California has manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims." *Id.* The Court then considered the expense and inconvenience that would be incurred by a California resident if required to bring suit in Texas and observed that most of the necessary witnesses were to be found in California. *Id. McGee* was not the first case in which the Supreme Court emphasized the interest of the state. *See, e.g.,* Hess v. Pawlowski, 274 U.S. 352, 356 (1927) (state interest in promoting safe use of highways by residents and nonresidents).

[50] *See generally* Comment, *supra* note 46, at 107-08 (*Hanson* ended trend toward relaxing minimum contacts standard).

[51] 357 U.S. 235 (1958).

[52] Dora Donner, a Delaware resident, established a trust in that state. She later moved to Florida but continued to instruct the trustee in matters concerning the Delaware trust. Mrs. Donner died in 1952, and her will was admitted to probate in Florida. Two of Mrs. Donner's daughters petitioned a chancery court in Florida for a declaratory judgment, claiming that the estate had not been effectively administered. In an attempt to gain jurisdiction over all indispensable parties, process was served personally on several of the defendants in the suit. Others, including many in Delaware who were indispensable parties, were given notice by regular mail. *Id.* at 238-43.

[53] Chief Justice Warren stated that, in the absence of minimum contacts, a defendant could not be forced to defend himself in a foreign forum no matter how slight the burden. *Id.* at 251. Further, the Court held that a state's courts did not acquire jurisdiction over all parties to a dispute simply because that state's law could be properly applied to the dispute. *Id.* at 248-49. The Court reasoned that a state "does not acquire . . . jurisdiction by being the 'center of gravity' of the controversy, or the most convenient location for litigation. The issue is personal jurisdiction, not choice of law." *Id.* at

dant[54] of the privilege of pursuing activities in the forum state.[55] The limitation of jurisdiction begun by *Hanson* was continued in *Shaffer v. Heitner*,[56] a suit involving a Delaware court's power to exercise quasi in rem jurisdiction over a nonresident's stock in a Delaware corporation.[57] While ending the traditional distinction between in rem and in personam actions,[58] the Supreme Court held that the defendant must

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[54] The Court announced that "it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Id.* at 253. This seems to require that the defendant voluntarily choose to associate with the forum state before the state's courts could exercise jurisdiction over him. *See generally* Note, *supra* note 13, at 934-35.

[55] Thus, *Hanson* and *McGee* differed in two important respects. While *Hanson* required a purposeful act of availment by the defendant, *McGee* did not. *See* note 54 and accompanying text *supra*. Also, while *McGee* gave considerable emphasis on forum convenience, *see* note 49 and accompanying text *supra*, *Hanson* held this factor to be irrelevant in deciding whether there had been minimum contacts with the forum state, *see* note 53 and accompanying text *supra*. *See generally* Comment, *supra* note 46, at 109 (*Hanson* found *McGee* to involve an act within the forum state). However, the rules of *Hanson* have been attacked as being only a means of avoiding an unfair decision by refusing to give it full faith and credit under the guise that the Florida court lacked jurisdiction. *See generally* Zammit, *Quasi-In-Rem Jurisdiction: Outmoded and Unconstitutional?*, 49 St. John's L. Rev. 668, 677 (1975) (means of avoiding unfair Florida law).

[56] 433 U.S. 186 (1977).

[57] The Greyhound Corporation, incorporated in Delaware, Greyhound Lines, Inc., a wholly owned subsidiary of the Greyhound Corporation, and 28 present and former officers of the corporation were named as defendants in a stockholders' derivative suit brought by a nonresident stockholder. It was alleged that the corporation lost a substantial amount of money due to mismanagement by the defendant officers. Pursuant to a motion by the plaintiff, a sequestration order was issued which required the seizure of all shares of corporate stock owned by the defendant officers, all of whom were nonresidents of Delaware. The defendants were notified of the suit by certified mail and by publication in a county newspaper. The defendant officers contended that the sequestration procedure denied them due process and moved to quash service of process and to vacate the sequestration order. The defendants' motions were denied, and this action by the trial court was affirmed by the Delaware Supreme Court. Greyhound Corp. v. Heitner, 361 A.2d 225, 228-29 (1976), *rev'd sub nom.* Shaffer v. Heitner, 433 U.S. 186 (1977).

[58] For a further discussion of in rem, quasi in rem, and in personam actions, see note 11 and accompanying text *supra*. Since *Shaffer*, jurisdiction cannot be asserted simply because the property is located within the state. *See* Comment, *supra* note 46, at 87. The Court held that:

> [I]n order to justify an exercise of jurisdiction *in rem*, the basis for jurisdiction must be sufficient to justify exercising "jurisdiction over the interests of persons in a thing." The standard for determining whether an exercise of jurisdiction over the interests of persons is consistent with the Due Process Clause is the minimum-contacts standard elucidated in *International Shoe*.

commit some act in the forum state before being subject to that state's jurisdiction.[59] The Court also indicated for the first time that the foreseeability of litigation might be considered in determining jurisdiction.[60]

In *Kulko v. Superior Court,*[61] an attempt was made to set forth criteria for determining the purposefulness of a defendant's contacts with the forum state.[62] This determination of purposefulness was com-

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433 U.S. at 207. Further, the Court declared the minimum contacts standard the basis for determining all state court jurisdiction. *Id.* at 212. The minimum contacts test was affirmed recently as the standard for quasi in rem actions in Rush v. Savchuk, 100 S. Ct. 571 (1980). *Rush* concerned an Indiana automobile accident in which the plaintiff, an Indiana resident, was injured while riding with the defendant, also an Indiana resident. The plaintiff moved to Minnesota where he brought suit and attempted to gain quasi in rem jurisdiction by garnishing the contractual obligation of the defendant's insurer to defend and indemnify the defendant. The plaintiff moved to add the insurer, which did business in Minnesota, as a party to the suit after the insurer disclaimed any obligation to the defendant. Both the defendant and his insurer then moved for dismissal of the complaint for lack of jurisdiction, but their motion was denied. *Id.* at 575-76. The contacts of the defendant's insurance company with Minnesota were held to be insufficient to satisfy the standard of minimum contacts necessary to subject the defendant to the forum state's jurisdiction. *Id.* at 579-80.

[59] The Court held that receiving economic benefit from the forum state was not, by itself, enough to support jurisdiction. There also must have been evidence that the defendant had committed some act within the state. 433 U.S. at 213, 215. However, the *Shaffer* Court never defined what constituted such an act. *See* Comment, *supra* note 46, at 122. After finding that the defendants had no connection with Delaware, the Court refused to consider the state's interest. 433 U.S. at 214-15. Until *Shaffer,* jurisdiction could have been based on a showing of a valid state interest. *Id.* at 223-24 (Brennan, J., concurring and dissenting); *see, e.g.,* Traveler's Health Ass'n v. Virginia, 339 U.S. 643, 647-48 (1950) (high state interest in requiring foreign insurance companies to comply with state guidelines); note 49 and accompanying text *supra.*

[60] The Court stated that the "appellants had no reason to expect to be hauled before a Delaware court." 433 U.S. at 216. Since the defendants had no reason to foresee a suit in Delaware, further discussion of the effect of foreseeability on a determination of jurisdiction over nonresident defendants was unnecessary. *Id. See generally* Comment, *supra* note 46, at 112-13 (reference to foreseeability only confused extent of endorsement by the Court). Justice Brennan urged, however, that even though the defendants had never "set foot" or committed any "acts related to the cause of action" in the state, Delaware should have been able to exercise jurisdiction in the suit "for jurisdiction can be based strictly on out-of-state acts having foreseeable effects in the forum state." 433 U.S. at 226 (Brennan, J., concurring and dissenting).

[61] 436 U.S. 84 (1978).

[62] After emphasizing the need to fulfill the *Hanson* requirement of a purposeful availment, *id.* at 93-94, the Court stated that purposefulness could be inferred from any of three situations, all taken from prior decisions. The first situation was one in which an injury occurring within the state was caused by a wrongful act outside the state. *Id.* at 96-97. *Compare id. with* Hess v. Pawloski, 274 U.S. 352, 356 (1927) (upholding a measure

bined with a balancing test[63] to ascertain the fairness of the state's

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requiring "a nonresident to answer for his conduct in the State where arise causes of action alleged against him"). The Court failed to state whether anything more was needed in order for the forum state to assert jurisdiction. 436 U.S. at 96-97. *See generally* Note, *Constitutional Law—Kulko v. Superior Court,* 12 CREIGHTON L. REV. 905, 920 (1979) (questionable whether physical harm within the forum state is sufficient to support jurisdiction). It would appear, however, that something more in the form of reasonable foreseeability should be required. *Id. See generally* Gorfinkel & Lavine, *Long Arm Jurisdiction in California Under New Section 410.10 of the Code of Civil Procedure,* 21 HASTINGS L.J. 1163, 1196-97 (1970) (the important consideration is whether it is foreseeable that any of the defendant's products would be used in the forum state). The second situation involved the solicitation of business from a state resident for economic gain, but the Court did not provide a practical test for inferring purposefulness from this circumstance. 436 U.S. at 96-97. *Compare id. with* McGee v. International Life Ins. Co., 355 U.S. at 223 (economic benefits, though minimal, sufficient for jurisdiction). The last situation mentioned by the Court was a controversy arising out of a contractual relationship with a state resident. 436 U.S. at 96-97. *Compare id. with* Hanson v. Denckla, 357 U.S. at 252 (action evolved out of an agreement having no connection with Florida). When a nonresident enters into a contract having a substantial connection with the forum state, it can be inferred that the nonresident is aware of the possibility of a lawsuit arising out of the contract. *See generally* Casad, *Long Arm and Convenient Forum,* 20 U. KAN. L. REV. 1, 23 (1971) (not unfair to require suit in state known by defendant to be affected by the transaction at issue). Since the nonresident is aware of the possibility of suit, he can make provisions for this contingency. *See generally* Comment, *Long-Arm and Quasi in Rem Jurisdiction and the Fundamental Test of Fairness,* 69 MICH. L. REV. 300, 322 (1970) (potential for subjection to a state's jurisdiction easily ascertainable when contract made). The nonresident also has access to the courts of the forum state as a plaintiff for controversies arising out of the contractual relationship within the state. It is therefore fair to hold the nonresident subject to the jurisdiction of the forum state. *See generally* Note, *supra,* at 929 (nonresident who purposefully takes benefits and protections of state subject to that state's jurisdiction).

[63] Under the balancing test, foreseeability of litigation determines the fairness of making a nonresident defend himself in the forum state. *See generally* Note, *supra* note 62, at 932-33 (court linking determination of purposeful contact with a balancing test). This foreseeability flows directly from the defendant's contacts with the forum state, and depends on a finding of purposefulness from which the required foreseeability must arise. 436 U.S. at 98-100. Unless there has been a purposeful act by the defendant and, therefore, anticipation of suit in the forum state, jurisdiction will generally be denied on the basis that the burden on the defendant outweighs the plaintiff's and state's interests. 436 U.S. at 98-101, 433 U.S. at 216-17. Generally the plaintiff's interest, consisting primarily of a desire to avoid incurring the hardship and expense of litigation in the defendant's state, will have little effect on the balancing test. *See* Note, *supra* note 62, at 935. Relevant state interests include providing resident plaintiffs with a forum, McGee v. International Life Ins. Co., 355 U.S. at 223; avoiding a multiplicity of lawsuits, Atkinson v. Superior Court, 49 Cal. 2d 338, 316 P.2d 960, 966 (1957) (suit by musicians attacking the validity of a collective bargaining agreement made by their agent); protecting resident's health and welfare, Olberding v. Illinois Cent. R.R., 346 U.S. 338, 341 (1953) (action against foreign truck owner arising out of a collision with a railroad overpass causing a derailment); and trying the suit under its substantive laws, 433 U.S. at 225-26 (Brennan,

assertion of jurisdiction.[64] Relying on this two part test, the Court held that a nonresident divorced father's act of allowing his daughter to live with her mother in the forum state[65] did not amount to a purposeful contact with the state.[66] Because of this lack of purposeful contact, the father could not have reasonably anticipated being required to defend a suit in that state. Applying the balancing test, the Court concluded that the burden on the defendant outweighed the interests of the state.[67] Although this test seems functional in most situations, it is not practical when a foreign defendant is alleged to have caused physical harm within the forum state.[68] It then becomes extremely difficult to determine whether the defendant purposefully initiated a relationship within the forum state.[69]

In the instant case, the Court reasoned that since the relationship between the defendant and the forum must be such that the corporation can reasonably be required to defend against a suit brought there, consideration must be given to the defendant's burden.[70] Furthermore, since due process prohibits a state from rendering a valid in personam judgment against any defendant who does not have minimum contacts with the forum state,[71] the state may also lose its power to render a

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J., concurring and dissenting). *See generally* Note, *supra* note 62, at 937 (state's interest limited in amount of influence on balancing test).

[64] 436 U.S. at 98-101.

[65] Pursuant to a separation agreement, later incorporated into a divorce decree, the couple's two children were to stay with their father in New York during the school year and with their mother in California during certain vacation periods. The couple's daughter decided to remain in California during the school year and flew to California using a ticket purchased by her father in New York. The mother brought suit in California for increased child support and the father was served with process under California's long arm statute. *Id.* at 87-90.

[66] *Id.* at 94-96.

[67] *Id.* at 98-100.

[68] *See* note 62 and accompanying text *supra.*

[69] *See generally* Casad, *supra* note 62, at 19 (difficulty in proving purposefulness); Note, *supra* note 62, at 919 (jurisdiction most likely imposed where nonresident takes action directly affecting forum state).

[70] World-Wide Volkswagen Corp. v. Woodson, 100 S. Ct. 559, 564 (1980). The Court held that the defendant's burden will be compared to other factors. These factors include the state's interest, the plaintiff's interest, the interest of the entire interstate court system, and the shared interest of all the states. *Id.* at 564.

[71] *Id.* The Court reaffirmed the minimum contacts standard of *International Shoe Co. v. Washington. See* note 41 and accompanying text *supra.* This standard protected the defendant from having to defend a suit in an inconvenient forum and prevented a state from imposing on the sovereignty of sister states. The Court indicated that where it is unreasonable or unfair to require the defendant to defend a suit in the forum state, the forum will be deemed inconvenient. 100 S. Ct. at 564.

binding judgment because of the due process clause.[72] Applying these considerations the Court concluded that since the defendants' only tie with Oklahoma was the accident, and since this isolated occurrence was insufficient to satisfy the minimum contacts requirement, Oklahoma could not subject the defendants to its jurisdiction.[73] In reaching this conclusion the Court rejected the respondent's argument that jurisdiction existed because the accident was foreseeable,[74] noting that foreseeability alone was not sufficient to satisfy due process requirements.[75] Since the necessary foreseeability is derived from the fact that the defendant can reasonably expect to defend himself in the forum state because of his contacts there,[76] a corporation can be subjected to the jurisdiction of a state only when there has been purposeful availment of the privilege of conducting activities within it.[77] Finally, the Court rejected the respondent's argument that the financial gain derived from the defendants' relationship with the forum state was sufficient to establish jurisdiction, because any benefits the defendants received from Oklahoma were too indirect to justify its exercise of jurisdiction.[78]

In dissent, Justice Brennan[79] argued that jurisdiction can be supported by less significant contacts as long as other considerations make its exercise fair and reasonable.[80] Since the interests of the state and other parties are of equal importance with the interests of the defendant, the extreme emphasis historically placed on the defendant's interests is unnecessary to ensure fairness.[81] Therefore, since there was a state interest[82] and since the defendants purposefully sold a product that obviously was made for travel throughout the United States[83] and derived substantial economic benefit in the process,[84] it was reasonable to subject the defendants to the jurisdiction of Oklahoma.[85]

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[72] This is true even if the defendant's inconvenience of litigation in the forum state is minimal, if there is a high state interest or if the forum state represents the most convenient place for the suit. 100 S. Ct. at 565-66.

[73] *Id.* at 566.

[74] *Id.* at 566-67.

[75] *Id.* at 566. The respondents argued that since the automobile was designed to be mobile, an accident in Oklahoma could have been foreseen. *Id.* In response the Court noted that in *Hanson* Mrs. Donner's move to Florida was foreseeable, but jurisdiction was denied. *See* note 52 and accompanying text *supra*. Similarly, in *Kulko* the daughter's move to California to live with her mother was foreseeable, but again jurisdiction was denied. *See* notes 65, 66 and accompanying text *supra*. 100 S. Ct. at 566.

[76] 100 S. Ct. at 567. The Court reasoned that while it was foreseeable that an automobile sold in New York would be driven to Oklahoma, it was not reasonable to grant Oklahoma jurisdiction over the defendants based on this single act. *Id.*

[77] *Id.* When there is such purposeful availment by the corporation, it has notice of the possibility of litigation within the forum state. The corporation can then act to protect itself through insurance, by raising the price of its products to absorb the expected increase in cost, or by ending all ties with the state if the risk is too great. *Id.*

[78] *Id.* at 567-68.

[79] *Id.* at 580 (Brennan, J., dissenting).

[80] *Id.* at 581. Justice Brennan reasoned that a determination of the significance of contacts with the forum is only one consideration in deciding fairness and reasonableness. Other considerations are the interests of the state and other parties in pursuing the case in the forum and the actual burden incurred by the defendant in defending the suit

Justice Brennan argued for a return to the logic of *McGee* which gave great weight to the interest of the forum state in determining jurisdiction.[86] He emphasized that a trial does not have to be held in the state with the "best contacts;" only the constitutional minimum enunciated in *International Shoe*[87] is required.[88] Combining the heightened state interest with the defendants' connection with the forum through the mobility of the automobile, the dissent reasoned that Oklahoma should have jurisdiction over the defendants.[89] This argument, taken to its logical conclusion, would subject virtually all manufacturers and distributors, without regard to size, to the jurisdiction of the court systems of the fifty states. While the automobile is made for travel and can be expected to be taken into any state, the same argument of mobility may be applied to most products. Although a particular product

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in the forum state. *Id.*

[81] *Id.* at 586. The relationship among the defendant, the plaintiff, the litigation, and the forum state are all important in determining whether a state can exercise jurisdiction over the defendant. Jurisdiction should not be determined by the relationship existing between any two of these parties. *Id.*

[82] Justice Brennan found a high state interest by considering several factors. The accident out of which the suit arose took place in Oklahoma, and the plaintiffs underwent medical treatment there. Furthermore, the witnesses and evidence necessary for the suit were in Oklahoma. Justice Brennan also recognized Oklahoma's interest in enforcing its highway safety laws. *Id.* at 583-84.

[83] *Id.* at 584-85. In a separate dissent, Justice Blackmun reasoned that the mobility of the automobile was the critical factor in the instant case. Justice Blackmun would therefore have upheld Oklahoma's assertion of jurisdiction over the defendants. *Id.* at 570-71 (Blackmun, J., dissenting).

[84] *Id.* at 585. In dissenting, Justice Marshall emphasized the economic benefit that the defendants had derived from the forum state. *Id.* at 569 (Marshall, J., dissenting). Justice Marshall reasoned that since the defendants had voluntarily chosen to become part of a nationwide chain of distribution and service from which they derived substantial income, they should have been amenable to a suit in a foreign forum arising out of this voluntary act. *Id.* at 568-71. Justice Marshall was joined by Justice Blackmun.

[85] *Id.* at 587-88.

[86] *See* note 49 *supra.*

[87] 326 U.S. at 316; *see* note 42 *supra.*

[88] 100 S. Ct. at 582.

[89] *Id.* at 584-85.

may be "designed to be used in one place,"[90] it is certainly foreseeable that such a product may be taken into other states when the product's owner moves. Surely it was not the intention of the dissent to require the Court to differentiate between products that are self-propelled and those that are not.

The majority recognized that there must be a limit to a small business' amenability to suit in a foreign forum.[91] In so doing, the Court refined the purposeful availment requirement first announced in *Hanson*[92] and further defined in *Kulko.*[93] According to *Kulko,* purposefulness may be inferred where a wrongful act outside the state causes injury within the state;[94] yet the Court failed to give any practical guidelines for drawing the inference.[95] The Supreme Court, in its opinion in *World-Wide,* set forth a test to determine the defendant's intent when injury is caused by a product injected into interstate commerce by a foreign corporation. While it is foreseeable that most products will find their way into other states far from the state in which they were originally purchased, this foreseeability alone would not support jurisdiction over a foreign corporation. The new test examines the reasonableness of the state's exercise of in personam jurisdiction.[96] Under the new standard, it may be inferred that a corporation has purposefully availed "itself of the privilege of conducting activities within the forum state . . ."[97] if an attempt has been made to derive economic benefit by either: (1) selling a product directly to the residents of the forum state, or (2) selling the product under conditions that make it reasonable to believe that a substantial quantity of the merchandise sold will find its way into the forum state.[98] Conditions which must be considered under this second category are the nature of the product sold,[99] the area directly served by the business, and the forum state's proximity to this area.[100] This new test should effectively differentiate between a regional business such as World-Wide, which is far removed from the forum state, and one which has some significant indirect connection with the forum state. For example, had World-Wide served all states west of the Mississippi River, Oklahoma's exercise of jurisdiction would have been reasonable. Oklahoma residents could have been expected to buy World-Wide's products on more than an isolated basis because of their proximity to the area served, the mobility of the automobile, and, in the case of new automobiles, the potential for savings due to the size of the purchase.

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[90] *Id.* at 584.

[91] *Id.* at 565-66.

[92] *See* note 54 *supra.*

[93] *See* note 62 *supra.*

[94] *Id.*

[95] *See* notes 68, 69 and accompanying text *supra.*

[96] 100 S. Ct. at 567.

[97] 357 U.S. at 253.

[98] 100 S. Ct. at 567.

[99] *Id.* at 568.

[100] *Id.* at 566-67.

If the corporation's activities in the forum state are found to be purposeful, it is still necessary to balance the interests of the defendant, the plaintiff, and the state.[101] Historically, the burden on the defendant has been the primary consideration.[102] *World-Wide,* however, gives added importance in the balancing test to the interests of the plaintiff, the state, and the interests of the entire interstate court system.[103] The majority also emphasized that before the balancing test is necessary[104] the defendant must have some contact with the forum state. However, the majority failed to consider the situation in which the plaintiff cannot afford to sue in the defendant's jurisdiction.[105] This situation may arise where the cost of suing in a foreign forum is disproportionate to the loss sustained or where the plaintiff simply does not have the money to pursue a cause of action in a foreign forum. This factor should be an important part of the consideration of the plaintiff's interest. Where the plaintiff's financial status is a factor, the court should relax its interpretation of the minimum contacts standard so that the plaintiff's inability to maintain suit "does not offend 'traditional notions of fair play and substantial justice.' "[106] This will necessitate a future compromise between the majority's rigid interpretation of the minimum contacts standard and the dissent's extremely liberal interpretation. By retaining the test of purposefulness as defined in *World-Wide* and modifying the balancing test, this compromise can be reached. While the interests of the interstate court system and the state are important in theory, the important practical interests are those of the plaintiff and defendant. The balancing test should reflect this practical importance by weighing the defendant's interest against the plaintiff's interest, assigning them equal weight, and disregarding other factors. Under this balancing test, the plaintiff's interest should be measured by the expense of litigation in the defendant's state,[107] the nature and extent of injury, and the plaintiff's financial status. The defendant's interest should be determined solely by the burden of defending a suit in the foreign forum. This test would give substantial protection to the interests of both the defendant and plaintiff. It is apparent, however, that no matter how fair the test is, there will be many cases in which one party will suffer a great deal of inconvenience.

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[101] *Id.* at 564.

[102] *See* note 63 *supra.*

[103] The plaintiff has an interest in obtaining a forum in which his suit can be efficiently and conveniently tried. The state's interest rests in settling the dispute, and the interstate court system has an interest in efficiently resolving all suits. 100 S. Ct. at 564.

[104] *Id.* at 565.

[105] Recognizing this problem, Justice Brennan stated that "[a]ccording jurisdiction does not expand liability except in the marginal case where a plaintiff cannot afford to bring an action except in the plaintiff's own State." *Id.* at 584 n.9.

[106] 326 U.S. at 316 (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)); *see* note 42 *supra.*

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[107] *See* note 63 *supra.*

CIVIL RIGHTS—SECTION 1983—MUNICIPAL CORPORATION IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR GOOD FAITH VIOLATIONS BY ITS OFFICIALS

Petitioner[1] brought an action for declaratory and injunctive relief[2] under 42 U.S.C. section 1983[3] in the District Court for the Western District of Missouri alleging that respondents'[4] discharge of petitioner[5] without notice and hearing violated his constitutionally protected substantive and procedural due process rights.[6] Rejecting petitioner's argument that he possessed a property interest in his job[7] and that the dismissal imposed a stigma of illegal or immoral conduct on his professional reputation and therefore deprived him of a liberty interest,[8] the trial court entered judgment for respondents.[9] On remand,[10] the Court of Appeals for the Eighth Circuit reaffirmed its original finding of a fourteenth amendment violation[11] but determined that respondents, including the city, were entitled to qualified immunity from liability.[12] On writ of certiorari, the United States Supreme Court, *held,* reversed. A municipality is not entitled to qualified immunity based on the good faith of its officials as a defense to liability under section 1983 for constitutional violations. *Owen v. City of Independence,* 445 U.S. 622 (1980).

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[1] The petitioner, George D. Owen, was employed by respondent city as chief of police for an indefinite term. Owen v. City of Independence, 445 U.S. 622, 625 (1980).

[2] The requested relief included a hearing on the discharge, back pay, and attorney's fees. *Id.* at 630.

[3] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[4] The respondents included the City of Independence, Missouri, City Manager Lyle W. Alberg, and the members of the city council. 445 U.S. at 630.

[5] Petitioner was discharged on April 18, 1972 by the city manager. *Id.* at 629. This action was pursuant to § 3.3(1) of the city's charter which gives the city manager sole authority to " '[a]ppoint, and when deemed necessary for the good of the service, lay off, suspend, demote, or remove all directors, or heads of administrative departments and all other administrative officers and employees of the city . . . .' " *Id.* at 625 n.2 (quoting the city charter).

[6] The discharge followed a dispute between petitioner and respondent city manager concerning petitioner's administration of duties. An investigation was initiated by the city manager into charges that a handgun shown by property room records to have been destroyed was subsequently found in the possession of a felon. Despite the city manager's conclusion that the investigation uncovered no evidence of criminal wrongdoing and his public statement to that effect on April 13, petitioner was asked to resign. On advice of counsel, petitioner refused to resign and requested written notice of charges and a hearing to answer those charges. On April 17, the city council released a report of the investigation to the news media, and on April 18, petitioner was discharged. *Id.* at 625-29.

[7] In Owen v. City of Independence, 421 F. Supp. 1110, 1120 (W.D. Mo. 1976), *aff'd*, 589 F.2d 335 (8th Cir. 1978), *rev'd*, 445 U.S. 622 (1980), the district court stated:

> [P]laintiff did not present any credible evidence that he had either a contractual right to continued employment, or that there existed a *de facto* tenure system which gave plaintiff a legitimate expectation of continued employment.

Section 1983[13] and its jurisdictional counterpart, 28 U.S.C. section 1343(a)(3),[14] originally took form in the Civil Rights Act of 1871.[15] The Civil Rights Act of 1871, in a legislative effort to control Ku Klux Klan abuses in the South during Reconstruction,[16] granted to the federal

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> Rather, a preponderance of the evidence shows that plaintiff knowingly served as Chief of Police at the will of the City Manager and was subject to discharge without notice of reasons and a hearing at any time the City Manager determined that his discharge was "for the good of the service."

421 F. Supp. at 1120.

[8] 421 F. Supp. at 1121-22.

[9] *Id.* at 1124.

[10] The court of appeals originally reversed the district court and held that petitioner had a liberty interest. Certiorari was granted, and the case was remanded for further consideration in light of Monell v. Department of Social Servs., 438 U.S. 902 (1978). 445 U.S. at 631-32.

[11] Owen v. City of Independence, 589 F.2d 335, 337 (8th Cir. 1978), *rev'd,* 445 U.S. 622 (1980).

[12] 589 F.2d at 338. Since Board of Regents v. Roth, 408 U.S. 564 (1972), and Perry v. Sindermann, 408 U.S. 593 (1972), which provided the rule on name-clearing hearings, were not decided until after the discharge, the Eighth Circuit held that the city acted in good faith without knowledge of the new ruling and was therefore immune from liability for its violation. 589 F.2d at 338.

[13] 42 U.S.C. § 1983 (Supp. III 1979).

[14] 28 U.S.C. § 1343(a)(3) (Supp. III 1979). The two statutes are usually construed as being complementary to each other, *see, e.g.,* Examining Bd. v. Flores de Otero, 426 U.S. 572, 583-84 (1976) (statutes intended to be and are complementary); Lynch v. Household Fin. Corp., 405 U.S. 538, 543 n.7 (1972) (same), and will be referred to jointly as section 1983 unless a distinction between the two is necessary.

[15] Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13. *See also* Lynch v. Household Fin. Corp., 405 U.S. 538, 545 n.9 (1972) (Civil Rights Act of 1871 modeled after Civil Rights Act of 1866, ch. 31, § 2, 14 Stat. 27); CONG. GLOBE, 42d Cong., 1st Sess. app. 68 (1871) (same).

[16] *See* CONG. GLOBE, *supra* note 15, at 436-40 (remarks of Congressman Cobb) (noting social and political disability of blacks and violence and lawlessness of Klan); *id.* at 457 (remarks of Congressman Coburn) (acts of Klan constituted large scale attacks on

courts a broad power to award damages for constitutional deprivations.[17] Section 1983 was intended to deter future deprivations and to compensate victims of past abuses.[18] Despite this broad remedial power, the forerunner of section 1983 remained almost dormant for decades.[19] From 1939 to 1945, however, a succession of Supreme Court cases opened the way for a liberal application and interpretation of the statute.

The Court began applying the statute to areas other than racial discrimination in *Hague v. CIO*,[20] a first amendment speech case. Following this decision, the Court in *United States v. Classic*[21] interpreted the phrase "under color of" law in the criminal analogue of section 1983 as meaning the wrongdoer must be "cloaked with the

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blacks).

The Senate committee which considered the 1871 Act was labeled the "Select Committee on Southern Outrages." Shapo, *Constitutional Tort: Monroe v. Pape, and the Frontiers Beyond,* 60 Nw. U.L. Rev. 277, 281 n.20 (1965-1966). *But cf.* Cong. Globe, *supra* note 15, at 658-59 (remarks of Senator Nye) (violence in Nevada demonstrated abuse not peculiar to the South).

[17] *See, e.g.,* Cong. Globe, *supra* note 15, at 475-77 (remarks of Congressman Dawes in support of the Act) (Act would fully incorporate the Bill of Rights); *id.* at app. 216 (remarks of Senator Turman in opposition to the Act) (Act would transfer all constitutional causes of action, no matter how slight, to the federal courts); *id.* at app. 49-50 (remarks of Congressman Kerr in opposition to the Act) (Act is covert attempt to transfer rightfully held state jurisdiction to federal courts).

[18] *See* Carey v. Piphus, 435 U.S. 247, 256-58 (1978) (§ 1983 both deters and compensates for constitutional violations).

[19] The Act was used only 21 times from 1871 to 1920. T. Emerson, C. Haber & N. Dorsen, Political & Civil Rights in the United States 1447-48 (3d ed. 1967), *cited in* Levin, *The Section 1983 Municipal Immunity Doctrine,* 65 Geo. L.J. 1483, 1484 n.3 (1977).

Until 1939 the Act was used almost exclusively to redress infringements on the voting rights of blacks. *See, e.g.,* Lane v. Wilson, 307 U.S. 268, 269-71 (1939) (holding Oklahoma statutory registration prerequisite to voting violated rights of blacks under the fifteenth amendment and gave rise to a private cause of action under the Act); Nixon v. Herndon, 273 U.S. 536, 539-40 (1927) (under the Act, a private cause of action arises from unlawful denial of voting rights under a Texas statute violating fourteenth amendment); Myers v. Anderson, 238 U.S. 368, 378 (1915) (holding election officers liable for civil damages under the Act for enforcement of grandfather clause in violation of fourteenth amendment).

[20] 307 U.S. 496 (1939). The Committee for Industrial Organization sought to enjoin city officials from enforcing ordinances prohibiting public meetings and distribution of printed matter without permits. The Court sustained the injunction even though the constitutional deprivations did not involve racial discrimination. *Id.* at 512 (opinion of Justice Roberts).

[21] 313 U.S. 299 (1941).

authority of" state law.[22] Three years later, the Court, in *Snowden v. Hughes,*[23] adopted the position that the statute applied to actions by state officials in violation of state law.[24] And finally, in *Screws v. United States,*[25] another criminal case, the Court defined "under color of" law as "under pretense of" law.[26]

Although *Screws* and *Classic* dealt with criminal actions, the lower federal courts quickly expanded their doctrines to civil suits involving official police[27] and non-police[28] actions and to suits for economic injuries.[29] Courts have since recognized that almost any common law tort committed by an individual state officer,[30] as well as systemic conduct,[31] may be viewed as a constitutional violation and sustain a cause of action under section 1983.[32] It was not until *Monroe v. Pape,*[33] however, that the United States Supreme Court applied more liberal inter-

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[22] In *Classic,* several Commissioners of Election in Louisiana were indicted for willfully altering and falsely counting and certifying the ballots of voters cast in a primary election for a representative in Congress. The Court held that actions "cloaked with the authority of" law and "under color of" law were proper grounds for the indictments. *Id.* at 326.

[23] 321 U.S. 1 (1944).

[24] In *Snowden* a candidate for state office was denied certification in a primary election as the party nominee in violation of state law. Although refusing the requested relief because no federal right had been violated, the Court recognized that "illegality under the state statute can neither add to nor subtract from [the] constitutional validity" of the defendant's actions. *Id.* at 11.

[25] 325 U.S. 91 (1945).

[26] In *Screws,* a sheriff, deputy, and policeman were indicted under the criminal analogue of § 1983 for beating a black man to death and thereby depriving him of life without due process of law. Although overstepping the authority granted by state law, the defendants were acting "under pretense of" law. The Court stated: "Acts of officers who undertake to perform their official duties are included whether they hew to the line of their authority or overstep it." *Id.* at 111.

[27] *See, e.g.,* Coleman v. Johnson, 247 F.2d 273, 273 (7th Cir. 1957) (permitting action against police officers and warden for wrongful detention); Geach v. Moynahan, 207 F.2d 714, 715, 717 (7th Cir. 1953) (allowing action against police officers for unlawful search and seizure, police brutality, and wrongful detention); Davis v. Turner, 197 F.2d 847, 847 (5th Cir. 1952) (allowing action against sheriff and deputy for wrongful detention and illegal search and seizure); Valle v. Stengel, 176 F.2d 697, 698, 699, 701 (3d Cir. 1949) (allowing action against chief of police for deprivation of use of public park); McShane v. Moldovan, 172 F.2d 1016, 1017, 1023 (6th Cir. 1949) (allowing action against constable and others for conspiring to deprive plaintiff of fair trial and for false arrest); Pickering v. Pennsylvania R.R., 151 F.2d 240, 249 (3d Cir. 1945) (explicitly adopting the "under pretense of" law interpretation in a police brutality action), *cert. denied,* 332 U.S. 776 (1947); State *ex rel.* Temple v. Central Sur. & Ins. Corp., 102 F. Supp. 444, 446 (W.D. Ark. 1952) (sustaining action against sheriff, deputy, city marshall, and state trooper for wrongful detention and brutality); Gordon v. Garrson, 77 F. Supp. 477, 479-80 (E.D. Ill. 1948) (sustaining complaint against superintendent of state farm and physician for brutality); Refoule v. Ellis, 74 F. Supp. 336, 337-38 (N.D. Ga. 1947) (sustaining complaint against police officers for wrongful detention).

By 1958, application of the *Screws* interpretation in civil suits was so well accepted, courts routinely applied it to police brutality cases. *See* Jackson v. Duke, 259 F.2d 3, 7 (5th Cir. 1958) (allegations of police brutality "under color of law" sufficient basis for federal jurisdiction for civil rights deprivation).

[28] *See, e.g.,* Hoffman v. Halden, 268 F.2d 280, 289 (9th Cir. 1959) (complaint against

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county health officer for wrongful detention held to state a cause of action); Erickson v. Hogan, 94 F. Supp. 459, 460 (S.D.N.Y. 1950) (injunction against district attorney's use of property illegally taken by law enforcement officers). *But see* Francis v. Lyman, 216 F.2d 583, 588 (1st Cir. 1954) (interpreting statute as remedy for racially motivated discrimination only).

[29] *See, e.g.*, Cobb v. City of Malden, 202 F.2d 701, 705 (1st Cir. 1953) (sustaining action alleging that teachers' contract rights were violated by city officials); Glicker v. Michigan Liquor Control Comm'n, 160 F.2d 96, 97, 101 (6th Cir. 1947) (sustaining action alleging that revocation of plaintiff's liquor license was intentional, discriminatory, and politically motivated); Burt v. City of New York, 156 F.2d 791, 791-92 (2d Cir. 1946) (sustaining action alleging discriminatory denial of permit applications for architects).

[30] *See, e.g.,* Russ v. Ratliff, 538 F.2d 799, 804 (8th Cir. 1976) (§ 1983 allows action for damages against police officer for excessive force), *cert. denied,* 429 U.S. 1099 (1977); Curtis v. Everette, 489 F.2d 516, 518 (3d Cir. 1973) (§ 1983 allows action by prisoner against prison officials for failure to restrain fellow prisoners), *cert. denied,* 416 U.S. 995 (1974); Scott v. Vandiver, 476 F.2d 238, 241 (4th Cir. 1973) (§ 1983 supports action for damages against temporary police officers). *But cf.* Paul v. Davis, 424 U.S. 693, 712 (1976) (rejected suit brought under fourteenth amendment for defamation by police officer since it was not a deprivation of a liberty or property interest).

[31] *See, e.g.*, Rhem v. Malcolm, 507 F.2d 333, 335-36 (2d Cir. 1974) (federal court has power to give declaratory and injunctive relief against due process and equal protection infringement in the Manhattan penal system by state and city officials under § 1983); Wyatt v. Aderholt, 503 F.2d 1305, 1313-14 (5th Cir. 1974) (mentally retarded patient's fourteenth amendment right to proper treatment can be enforced in action against a state). *See also Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1173 (1977) (federal courts have power to give declaratory and injunctive relief in suits against state and local educational, law enforcement and penal systems).

[32] One recent constitutional development is the right to a name-clearing hearing for a government employee allegedly stigmatized in the course of his discharge. *See* Paul v. Davis, 424 U.S. 693, 711-12 (1976) (reputation alone is not a liberty or property interest which requires notice and hearing); Perry v. Sindermann, 408 U.S. 593, 601-03 (1972) (notice and hearing required prior to termination of employment if property interest is created by de facto tenure); Board of Regents v. Roth, 408 U.S. 564, 578 (1972) (no hearing required for nontenured position); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971) (stigma placed on individual's name by police official a sufficient liberty interest to require notice and hearing). *See generally* Lawson, *Paul, Bishop & Meachum—Short-lived Aberrations or Plagues-on-Developing Due Process-Protections?*, 20 How. L.J. 419, 443 (1977) (discussing recent restrictions on right to name-clearing hearing); 18 B.C. INDUS. & COM. L. REV. 545, 551 (1977) (same).

[33] 365 U.S. 167 (1961). In this case, plaintiffs sought damages from both individual police officers and the City of Chicago for invasion of their constitutional rights by a warrantless search and a subsequent unauthorized detention of Mr. Monroe. *Id.* at 169.

pretations to civil actions.[34] *Monroe* injected vitality into section 1983 by broadening its application,[35] but it also granted absolute immunity to municipal corporations[36] on the rationale that Congress in 1871 did not intend to include municipalities as "persons" amenable to suit under the statute.[37]

Subsequent to *Monroe,* many lower courts devised theories to limit or circumvent a municipality's immunity. One theory was that although the "non-person" rule in *Monroe* applied in cases in which state law had not withdrawn municipal immunity, it did not apply where state law subjected municipalities to suit in other actions.[38] Another theory developed by the lower courts was that *Monroe* prohibited only damage suits and was inapplicable to suits seeking injunctive relief.[39] Finally, some courts avoided the "non-person" rule of *Monroe* by employing the rationale of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*[40] to hold that money damages were available against a municipality directly under the fourteenth amendment rather than section 1983.[41] However, the Supreme Court subsequently rejected the first two theories[42] and expressly refused to decide the validity of the third.[43]

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[34] *Id.* at 187. The Court extended the *Screws* "under color of" law definition to civil actions and adopted *Classic*'s inclusion of actions in violation of state law. *Id.*

[35] *Id.* at 172. The Court held that Congress, in enacting the section, intended to provide a remedy for deprivation of constitutional rights, privileges, and immunties by an official's abuse of position. *Id.* The expansion by *Monroe* of the types of sustainable causes of action has produced an explosion in the number of suits brought under § 1983. Federal civil rights suits have risen from a total of 300 filed in 1960 under all the civil rights acts combined, to over 19,000 filed in 1976 under § 1983 alone. *Developments in the Law—Section 1983 and Federalism, supra* note 31, at 1136 n.7.

[36] 365 U.S. at 187.

[37] *Id.* at 191. To determine the legislative intent, the Court relied heavily on the debate concerning the proposed Sherman amendment to the 1871 Civil Rights Act to place liability on municipal corporations for personal injuries resulting from acts of violence occurring within the municipality. CONG. GLOBE, *supra* note 15, at 663. The amendment was rejected by the House of Representatives because the members determined that Congress had no constitutional power to impose any obligation upon a municipality. *Id.* at 800-04. The Court reasoned that since Congress refused to impose liability through the Sherman amendment it probably did not intend to include municipalities within the word "person" in the Civil Rights Act itself. 365 U.S. at 191.

[38] Carter v. Carlson, 447 F.2d 358, 369 (D.C. Cir. 1971) (municipal liability under § 1983 governed by state law), *rev'd on other grounds sub nom.* District of Columbia v. Carter, 409 U.S. 418 (1973).

[39] Dailey v. City of Lawton, 425 F.2d 1037, 1038-39 (10th Cir. 1970) (injunction granted against municipal activity violating fourteenth amendment).

[40] 403 U.S. 388, 397 (1971) (money damages awarded in suit brought directly under fourth amendment against police officers for violation of privacy rights).

[41] Stapp v. Avoyelles Parish School Bd., 545 F.2d 527, 531 n.7 (5th Cir. 1977) (federal question jurisdiction would support a cause of action for damages brought directly

In *Monell v. Department of Social Services*,[44] the Supreme Court overruled *Monroe* to the extent that it held municipalities were not "persons" under section 1983.[45] After a lengthy reexamination of the legislative history of the Civil Rights Act of 1871, the Court in *Monell* concluded that the *Monroe* Court had misconstrued the legislative intent of the 1871 Congress.[46] Although the Court held that municipali-

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under fourteenth amendment).

[42] *See* City of Kenosha v. Bruno, 412 U.S. 507, 513 (1973) (municipalities immune from § 1983 actions for both damages and injunctive relief); Moor v. County of Alameda, 411 U.S. 693, 706-07 (1973) (municipality immune from § 1983 actions despite withdrawal of immunity under state law). *But see* Levin, *supra* note 19, at 1497 (court's silence on issue of officer's liability in his "official capacity" in *City of Kenosha v. Bruno* created loophole whereby the plaintiff may bring suit against a municipal officer in his official capacity; officer has authority to use "machinery of government" to take any corrective action ordered). *Cf.* Edelman v. Jordan, 415 U.S. 651, 664-69 (1974) (limiting "official capacity" remedies to prospective injunctive relief, not retroactive awards requiring disbursement of public funds).

[43] Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 278 (1977) (issue of whether *Bivens*-type of action allowable not decided).

[44] 436 U.S. 658 (1978).

[45] *Id.* at 663.

[46] *Id.* at 690. The Court in *Monell* distinguished between the 42d Congress' reluctance to impose liability on a municipal corporation for the acts of others, *see* CONG. GLOBE, *supra* note 15, at 663, and the creation of a civil remedy against a municipality that had itself infringed federal rights. 436 U.S. at 669. Citing remarks by the author, Representative Shallabarger, CONG. GLOBE, *supra* note 15, at app. 68, concerning the broad interpretation to be afforded the Act, the Court concluded that the statute covered legal, as well as natural, persons for the purpose of liability. 436 U.S. at 683. In addition, the Court cited remarks by Representative Bingham, CONG. GLOBE, *supra* note 15, at app. 84, concerning Congress' intent to overrule Barron v. Mayor of Baltimore, 32 U.S. (7 Pet.) 243 (1833), a case affording no cause of action against a city in a condemnation without compensation suit. 436 U.S. at 686-87. Further, the Court determined that Supreme Court cases prior to the enactment of the statute had established that for all intents and purposes, municipalities were persons. *See* Cowles v. Mercer County, 74 U.S. (7 Wall.) 118, 121 (1868) (municipal corporations treated as natural persons), *cited in Monell*, 436 U.S. at 687-88; Louisville R.R. v. Letson, 43 U.S. (2 How.) 497, 558 (1844) (corporation created by and doing business in state is treated as a natural person). Finally the Court in *Monell* noted that the Dictionary Act of 1871, ch. 71, 16 Stat. 431, passed only months before the Civil Rights Act, defined "person" as extending to "bodies politic and corporate." 436 U.S. at 688. Although the Court in *Monroe* considered the same Dictionary Act and construed its definition of "person" as a permissive one, 365 U.S. at 191, the Court in *Monell* focused on remarks during the debate on the Dictionary Act by Senator Trumbull in which he used interchangeably the words "may" and "shall." CONG. GLOBE, 41st Cong., 3d Sess. 775 (1871), *noted in* 436 U.S. at 689-90 n.53. The *Monell* Court concluded that Congress therefore intended the definition to be

ties were persons amenable to suit under section 1983, it rejected a theory of respondeat superior for municipal liability[47] and expressly refused to decide whether a municipality is entitled to some form[48] of qualified good faith immunity from liability.[49]

On its face, section 1983 allows no immunity from liability,[50] but when the immunity is well grounded in common law and supported by strong policy, the Supreme Court has recognized it.[51] The Court first recognized an immunity to suit under the forerunner of section 1983 in *Tenney v. Brandhove*[52] which was subsequently cited with approval in *Scheuer v. Rhodes*[53] and *Imbler v. Pachtman.*[54] In *Scheuer,* the Court relied upon both a common law doctrine and policy considerations in justifying the extension of a qualified immunity to executive officers for discretionary acts performed in the course of their official conduct.[55] Similarly, the Court in *Imbler* extended the common law abso-

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mandatory. 436 U.S. at 689-90 & n.53. The Court also concluded that if no mandatory construction were given to the Dictionary Act, there would be no "rules of construction" of the Dictionary Act as was intended by its authors. *Id.*

[47] 436 U.S. at 694. The Court stated:

> We conclude, therefore, that a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id.

[48] *See* 1979 Wis. L. Rev. 943, 948 n.32 (discussing whether *Monell* Court mistakenly referred to "official" rather than "qualified" immunity).

[49] 436 U.S. at 701. The courts of appeals, in considering the question of qualified municipal immunity based on the good faith of municipal officers, are divided. *Compare* Paxman v. Campbell, 612 F.2d 848, 855 (4th Cir. 1980) (en banc) (granting good faith immunity) *and* Sala v. County of Suffolk, 604 F.2d 207, 211 (2d Cir. 1979) (same) *with* Hostrop v. Board of Junior College Dist. No. 515, 523 F.2d 569, 577 (7th Cir. 1975) (refusing to extend qualified immunity to government officials) *and* Hander v. San Jacinto Junior College, 519 F.2d 273, 278 (5th Cir. 1975) (same).

[50] Imbler v. Pachtman, 424 U.S. 409, 417 (1976) (no tort immunity on face of § 1983).

[51] *See id.* at 417 (§ 1983 read in harmony with general tort immunities).

[52] 341 U.S. 367, 376 (1951) (historical absolute immunity of legislators for official actions extended to suits brought under predecessor of § 1983).

[53] 416 U.S. 232, 239 n.4 (1974).

[54] 424 U.S. 409, 417 (1976); *accord,* Procunier v. Navarette, 434 U.S. 555, 561 (1978) (qualified immunity for prison officials and officers); O'Connor v. Donaldson, 422 U.S. 563, 577 (1975) (qualified immunity for superintendent of state hospital); Wood v. Strickland, 420 U.S. 308, 322 (1975) (qualified immunity for local school board members); Pierson v. Ray, 386 U.S. 547, 554 (1967) (absolute immunity for state judges).

[55] 416 U.S. at 239-40. The Court's conclusion was based on the common law doctrine that the "king can do no wrong" and the policy considerations of: (1) the injustice of

lute immunity of a prosecutor from malicious prosecution suits to proscribe the same action brought under section 1983.[56]

Because of the confusing dual character of municipalities as governmental bodies and corporations,[57] no consistent municipal immunity developed at common law.[58] Municipal immunity,[59] originally an extension of the sovereign immunity of the state,[60] was adopted in America during the early nineteenth century.[61] However, criticism of this doctrine became widespread,[62] and several states legislatively abol-

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subjecting an officer to liability who is required by his position to exercise discretion, and (2) the danger of an officer's decreased willingness to execute his office with decisiveness and judgment. *Id.*

[56] 424 U.S. at 427-28.

[57] "Municipal corporations are regarded as having a rather curious dual character, which has given the courts a great deal of difficulty, and has left the law in a tangle of disagreement and confusion." W. Prosser, Handbook of the Law of Torts § 131, at 977 (4th ed. 1971). This confusion stems from the fact that while a municipality is a governmental subdivision with all the attendant powers and responsibilities of a governmental body, it is also a corporate entity sharing in the special relationships and interests of corporations generally. *Id.*

[58] *See* Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955) (holding United States liable for damages caused by Coast Guard's negligent operation of a lighthouse). *See generally* W. Prosser, *supra* note 57, at 981-82 (conflicting areas of liability for municipalities).

[59] > [I]n the absence of any statute to the contrary, they [municipal corporations] have the privilege and immunity of the state; they partake of the state's prerogative of sovereignty, in that they are exempt from private prosecution for the consequences of their exercising or neglecting to exercise the governmental powers they possess.

1 T. Shearman & A. Redfield, A Treatise on the Law of Negligence § 253, at 468 (5th ed. 1898).

[60] The first case to extend the immunity of the state to a municipality was Russell v. Men of Devon, 100 Eng. Rep. 359 (1788), *noted in* W. Prosser, *supra* note 57, at 978 & n.74.

[61] *See* Smith & Singer, *Limitations on Federal Judicial Power in Civil Rights Cases: "Persons," Eleventh Amendment, Immunities, Vicarious Liability,* 14 Wake Forest L. Rev. 711, 730 (1978) (discussing recognition of municipal immunity from tort claim for damages).

Governmental immunity of municipalities was never completely accepted by American courts because it runs contrary to two concepts: (1) in tort law, liability follows negligence, and (2) the constitutional guarantee that a person is entitled to a legal remedy for personal and property injuries. 18 E. McQuillin, Municipal Corporations § 53.02, at 104 (3d rev. ed. 1977).

[62] *See, e.g.,* Antieau, *The Tort Liability of American Municipalities,* 40 Ky. L.J. 131, 133, 147-49 (1952) (criticism of municipal immunity); Borchard, *Government Liability in Tort* (pts. 1-3), 34 Yale L.J. 1, 129, 229 (1924-1925) (same); Smith, *Municipal Tort Liability,* 48 Mich. L. Rev. 41, 56 (1949) (same). *See generally* W. Prosser, *supra* note 57, at 978 & n.80 (citing authorities criticizing municipal immunity).

ished municipal immunity.[63] The courts have also sought methods to circumvent[64] municipal immunity. Originally, courts limited governmental immunity[65] by recognizing the governmental-proprietary distinction in municipal functions.[66] This distinction[67] allowed courts to impose liability upon a municipal entity for proprietary functions while still recognizing sovereign immunity for governmental acts.[68] Some

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[63] *See, e.g.*, MICH. COMP. LAWS ANN. §§ 691.1401-.1406 (1968 & Supp. 1980); OR. REV. STAT. §§ 30.260-.300 (1979).

[64] *See, e.g.*, Jeakins v. City of El Dorado, 143 Kan. 206, 53 P.2d 798, 800 (1936) (city liable for sewage nuisance); Kurtigian v. City of Worcester, 348 Mass. 284, 203 N.E.2d 692, 694 (1965) (city liable for maintenance of a nuisance even when acting in its governmental capacity); Gaines v. Village of Wyoming, 147 Ohio St. 491, 72 N.E.2d 369, 372 (1947) (city liable for maintenance of a nuisance even when acting in its police power).

[65] "The fact of the matter is that the theory whereby municipalities are made amenable to liability is an endeavor, however awkward and contradictory, to escape from the basic historical doctrine of sovereign immunity." Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[66] This distinction was based on the dual character of the municipal entity. The governmental functions are those which only the government can adequately perform for the benefit of the citizen. Proprietary functions, on the other hand, are those which might easily be performed by a private corporation. This distinction, as applied by the various courts, is unclear. W. PROSSER, *supra* note 57, at 979-83; *see* McGinley v. City of Cherryvale, 141 Kan. 155, 40 P.2d 377, 379 (1935) (city liable for employee negligence when acting in its proprietary capacity); Bean v. City of Moberly, 350 Mo. 975, 169 S.W.2d 393, 397 (1943) (no municipal liability for breach of duty in connection with governmental acts); Fidelity Laboratories, Inc. v. Oklahoma City, 191 Okla. 473, 130 P.2d 834, 836 (1942) (city not liable for damages resulting from passage of ordinances as a governmental function). This distinction is recognized in every jurisdiction except South Carolina and Florida. W. PROSSER, *supra* note 57, at 979.

[67] "Logically . . . there is no reason why a line should be drawn between some governmental functions and others. But at least it has the virtue of mitigating the injustices of the anachronous doctrine of governmental immunity." Bingham v. Board of Educ., 118 Utah 582, 223 P.2d 432, 441 (1950) (Wolfe, J., dissenting).

[68] *E.g.*, Lenoir v. Porters Creek Watershed Dist., 586 F.2d 1081, 1090 (6th Cir. 1978) (governmental-proprietary distinction determines limits of immunity in Tennessee); Rieser v. District of Columbia, 563 F.2d 462, 474 & n.64 (D.C. Cir. 1977) (sovereign immunity of the District of Columbia limited to nonproprietary functions); Nathaniel v. City of Moss Point, 385 So. 2d 599, 601 (Miss. 1980) (recovery precluded when municipal function is governmental in nature); Tucker v. City of Okolona, 227 So. 2d 475, 476 (Miss. 1969) (municipality liable for negligent performance of a proprietary duty); *cf.* Employees of the Dep't of Pub. Health and Welfare v. Department of Pub. Health and Welfare, 411 U.S. 279, 284-85 (1973) (some state governments liable for "proprietary functions," but not "governmental functions"); Parden v. Terminal R.R., 377 U.S. 184, 192 (same). *See generally* E. MCQUILLIN, *supra* note 61, at 104-08 (development of governmental-proprietary distinction). This distinction has resulted in conflicting classifications within and among the jurisdictions. *Id.* at 105.

The Supreme Court, in referring to the distinction, has stated: "A comparative study of the cases in the forty-eight States will disclose an irreconcilable conflict. More courts have recently taken the further step of abrogating municipal immunity for governmental as well as proprietary functions.[69] Even these courts, however, have continued to recognize governmental immunity for "discretionary" or legislative decisions concerning public policy.[70] Absent these exceptions, municipalities have been held liable for tort in the same manner as any other corporation,[71] and the recent trend has been to limit rather than expand municipal immunity.[72]

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than that, the decisions in each of the States are disharmonious and disclose the inevitable chaos when courts try to apply a rule of law that is inherently unsound." Indian Towing Co. v. United States, 350 U.S. 61, 65 (1955).

[69] *See, e.g.*, Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 359 P.2d 457, 458, 11 Cal. Rptr. 89, 90 (1961) (rejecting all governmental immunity from liability for torts). *See generally* E. McQuillin, *supra* note 61, at 106-07 (trend toward abrogation of governmental immunity); Smith & Singer, *supra* note 61, at 730 (governmental immunity of municipalities abrogated in about half the states). This immunity is based not on the shared sovereign immunity of the state but rather on the concern for separation of powers. W. Prosser, *supra* note 57, at 986 & n.67.

[70] *See* Papelian v. State Dep't of Motor Vehicles, 65 Cal. App. 3d 958, 136 Cal. Rptr. 665, 667 (1976) (discretionary issuance of driver's license to applicant could not afford basis for liability of state or Department of Motor Vehicles for death of motorist whose vehicle collided with applicant's vehicle); Elmer v. City of St. Petersburg, 378 So. 2d 825, 827 (Fla. Dist. Ct. App. 1979) (decision to remove police from area in which it was feared a riot might occur fell within scope of city's discretionary planning function and, hence, was immune from tort liability); Brown v. Little, 139 Ga. App. 176, 228 S.E.2d 159, 160 (1976) (absent law or ordinance requiring city to erect traffic light at intersection where plaintiff was injured, the erection and maintenance of such a signal was discretionary and city could not be held liable for failure to perform such act); Young v. Wlazik, 262 N.W.2d 300, 311 (Minn. 1977) (city not liable, based on passage of 30-mile-per-hour train speed ordinance, for injuries sustained by passenger of car in collision between car and train since decision to enact ordinance was discretionary and shielded by immunity); Merrill v. City of Manchester, 114 N.H. 722, 332 A.2d 378, 383 (1974) (municipalities immune from liability for acts and omissions in the exercise of legislative or judicial function and the exercise of executive or planning function in making basic policy decision); Baker v. State Bd. of Higher Educ., 20 Or. App. 277, 531 P.2d 716, 721 (1975) (selection of appropriate site for public gathering is type of decision requiring exercise of technical judgment and thus is a discretionary function which immunizes public body from tort liability).

[71] *See, e.g.*, Knowles v. Housing Auth., 212 Ga. 729, 95 S.E.2d 659, 662-63 (1956) (state-created housing authority was public corporation which was liable for its negligent acts); Dallas v. City of St. Louis, 338 S.W.2d 39, 44 (Mo. 1960) (municipality liable for its negligence when acting as a corporation); Eversole v. City of Columbus, 169 Ohio St. 205, 158 N.E.2d 515, 518 (1959) (city liable for its negligence when performing acts relating to corporate benefit or profit).

[72] Common criticisms of the doctrine of municipal immunity include allegations that it is antithetic to American justice, that it causes the victim of governmental negligence to sustain the burden of loss, and that the burden should be borne by the unit of government responsible, distributing the loss among its citizens. *See generally* Borchard, *supra*

In the instant case the majority[73] determined that since section 1983 does not mention privileges, immunities, or defenses, and since the statute applies to municipalities as well as natural persons, then by its terms and legislative history, section 1983 contains no immunities on its face.[74] However, the Court reasoned that since qualified municipal immunity was not firmly established in the common law when section 1983 was enacted, and since there was no strong policy justification for such an immunity at that time, then Congress need not have specifically stated in the statute a wish to abolish that immunity.[75]

The Court offered two reasons why municipal corporations should not be afforded a qualified immunity to actions under section 1983.[76] First, the purpose of section 1983, to protect those wronged by abuses of governmental authority and to deter future violations of constitutional rights, would be subject to circumvention by a qualified immunity of both the municipality and its officers.[77] Second, the danger that possible personal liability would inhibit effective execution of official responsibilities is inapplicable to the question of municipal liability.[78]

In dissent, Justice Powell[79] reasoned that since the right to a due

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note 62, at 22-28 (criticism of immunity for public corporations); David, *Tort Liability of Local Government: Alternatives to Immunity from Liability or Suit,* 6 U.C.L.A. L. REV. 1, 53 (1959) (argument in favor of liability due to availability of insurance); Van Alstyne, *Governmental Tort Liability: A Decade of Change,* 1966 U. ILL. L.F. 919, 921 (noting trend toward abrogation of governmental immunity).

[73] Justice Brennan authored the majority opinion and was joined by Justices White, Marshall, Blackmun and Stevens. Owen v. City of Independence, 445 U.S. 622, 624, 658 (1980).

[74] *Id.* at 635-36.

[75] *Id.* at 637-38. The majority concluded that the common law doctrine of municipal immunity was not intended to limit municipal liability under § 1983 for three reasons. First, common law municipal immunity from liability for tortious acts committed while engaged in a governmental function was abrogated by congressional enactment of § 1983 making municipalities amenable to suit. Second, the principle of municipal immunity for "discretionary or legislative" functions was based on preventing courts from substituting their judgment for that reserved to the lawful discretion of the municipality. Finally, a municipality had no "discretion" to violate constitutional rights. *Id.* at 644-50.

[76] *Id.* at 638.

[77] *Id.* at 650-51. Most governmental officers are entitled to a qualified good faith immunity from liability in § 1983 actions. If a similar immunity were extended to municipalities, violations might go unremedied, thus defeating the statutory purpose of protection and deterrence. *Id.*

[78] *Id.* at 651-56. In a suit directly against a municipality, for example, the damages award would come not from the officer's personal funds but from the municipal treasury. Therefore, the officer executing his responsibilities would not fear a personal judgment, and his performance would not be inhibited.

[79] Joining Justice Powell in dissent were Chief Justice Burger and Justices Stewart

process "name-clearing" hearing was initially announced by the Supreme Court only ten weeks after petitioner was discharged,[80] the respondent city should not be charged with predicting the evolution of this new constitutional principle.[81] Even if the municipality were responsible for such a prediction, Justice Powell argued that since petitioner's dismissal in this case involved a proper exercise of discretionary municipal power, and since respondent city imposed no stigma of illegal or immoral conduct on petitioner, then no "name-clearing" hearing was required under the due process clause.[82] Justice Powell concluded that since both the prior decisions of the Court under section 1983 and the concerns of Congress when the statute was enacted were contrary to a construction of strict liability of municipalities for constitutional violations,[83] and since the vast majority of current state law and common law precedent recognized municipal immunity,[84] then municipalities should be afforded a qualified "good faith" immunity under section 1983.[85]

By holding that a municipality has no qualified "good faith" immunity against section 1983 actions, the Court has removed a major obstacle from suits for deprivations of constitutionally guaranteed civil rights. Opposition to such a holding is usually supported by three arguments. The first is that qualified municipal immunity is a logical extension of qualified official immunity. However, as noted by the Court in the instant case, the considerations warranting qualified immunity for officials[86] are not applicable to a municipal defendant since the monetary relief would come from the municipal treasury and not the private

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and Rehnquist. *Id.* at 658.

[80] *Id.* at 661. The opinion which announced this right, Board of Regents v. Roth, 408 U.S. 564 (1972), was decided in June. The petitioner was discharged in April, ten weeks earlier. 445 U.S. at 651.

[81] 445 U.S. at 683.

[82] *Id.* at 662-63. Justice Powell relied heavily on the congressional debate of the Sherman amendment and Congress' reluctance to impose vicarious liability on a municipality to infer an intent not to impose strict liability on municipalities for violations caused by actions believed in good faith to be legal. *Id.* at 671-76.

[83] *Id.* at 664-76.

[84] *Id.* at 676-83. Justice Powell cited W. PROSSER, *supra* note 57, at 986-87, to support this contention. However, a close reading of this section shows the general decline of the doctrine with the only vestige of municipal immunity found in the discretionary "legislative" or "judicial" functions of government. W. PROSSER, *supra* note 57, at 986-87.

[85] 445 U.S. at 683.

[86] These considerations include the possibility that the risk of personal financial loss would deter the decision maker from independently exercising his judgment and also the injustice of subjecting an officer to liability who is required by law to exercise discretion. *Id.* at 655-56.

funds of the decision maker. Because monetary relief comes from municipal treasuries, a second argument advanced by supporters of immunity is that municipalities may be financially unable to survive section 1983 judgments.[87] However, municipalities are already amenable to suit under section 1983 since the *Monell* ruling that municipal corporations are "persons" for the purposes of a section 1983 action. Furthermore, this fear has not been well founded; the supporters of qualified municipal immunity are hard pressed to establish sound empirical evidence in their support.[88] Additionally, if the municipality is immune from liability, the loss is borne by the victim rather than the perpetrator.

Since municipalities may easily insure themselves against damages awards, the principle of equitable loss-spreading dictates that the loss be borne by the city and passed on to the populace as a whole.[89] This strain on the public fisc, when compared to the possibility of unremedied, albeit "good faith" deprivations of constitutional rights, is relatively inconsequential in light of traditional concepts of American justice.[90] Further, *Monroe* did not grant blanket immunity to municipalities in all causes of action.[91] Municipalities are amenable to suit under section 1982,[92] in *Bivens*-type actions brought directly under the Constitution,[93] and in equitable actions under section 1983.[94] Although courts in these actions are generally silent on the issue of qualified immunity, it has usually been rejected when considered.[95] A qualified immunity for municipalities would be unprecedented in civil rights law.[96] Furthermore, most authorities agree that municipal liability has a deterrent effect to constitutional violations which would otherwise be defeated by recognition of an immunity.[97] In conclusion, the Court in the instant case has struck a proper balance among the competing interests involved in a section 1983 cause of action. The victim of the official conduct is assured of a remedy for his injury, the official acting in good faith is assured immunity from personal liability, the loss is spread to the entire public where it is more easily and equitably borne, and the deterrent effect of section 1983 is preserved.

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[87] Monell v. Department of Soc. Servs., 436 U.S. 658, 724 (Rehnquist, J., dissenting).

[88] David, *supra* note 72, at 53.

[89] Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Act*, 45 S. CAL. L. REV. 131, 138-39 (1972).

[90] *Id.* at 138 & n.41.

[91] *See generally* 1979 WIS. L. REV. 943, 958-61.

[92] *Id.* at 958; *see* Morales v. Haines, 486 F.2d 880, 882 (7th Cir. 1973) (municipality liable in a § 1982 action for compensatory and punitive damages and attorney's fees). The court disregarded the qualified municipal immunity rule. *Id.*

[93] 1979 WIS. L. REV. at 955 n.66, 958.

[94] *See, e.g.*, Incarcerated Men of Allen County Jail v. Fair, 507 F.2d 281, 288 (6th Cir. 1974) (equitable monetary relief in the form of attorney's fees could be awarded against local officials in action for amelioration of local jail conditions, regardless of severe impact on local government funds); League of United Latin Am. Citizens v. City of Santa Ana, 410 F. Supp. 873, 909 (C.D. Cal. 1976) (awarding back pay under discriminatory hiring policies of the fire and police department). The court rejected a qualified immunity defense although the award may financially retard the city's affirmative action program. *Id.*

[95] *See, e.g.*, Riley v. City of Minneapolis, 436 F. Supp. 954 (D. Minn. 1977) (municipality cannot raise the qualified immunity defense in fourteenth amendment action for compensatory and punitive damages). Garner v. Giarusso, 571 F.2d 1330 (5th Cir. 1978)

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(qualified municipal immunity is not applicable in action for back pay and damages under 42 U.S.C. § 1981 (1976)), is the only § 1981 case that discusses and rejects the qualified immunity defense. 1979 Wis. L. Rev. at 961 n.87.

[96] 1979 Wis. L. Rev. at 961. The commentator observed that no previous rationale supports the qualified immunity defense for municipalities. *Id.*

[97] *Id.* at 957 n.74. The commentator's matter-of-fact statements suggest widespread acceptance of the proposition that immunity would defeat the deterrent effect of municipal liability. *Id.*

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THE *MENS REA* REQUIREMENT OF ACCOMPLICE LIABILITY IN AMERICAN CRIMINAL LAW — KNOWLEDGE OR INTENT*

*Louis Westerfield***

INTRODUCTION

At common law, parties to felonies were categorized as either accessories or principals according to the character of their participation in the felonious conduct.[1] An accessory was one who gave countenance to the actual perpetrator without being actually or constructively present,[2] while a person present at the scene of the crime was a principal.[3] The party actually committing the crime was a principal in the first degree,[4] while a party standing by and assisting in the commission of the crime was a

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[1] *See* 4. W. BLACKSTONE, COMMENTARIES *34-38 (common law view of parties to crime); W. LAFAVE & A. SCOTT, CRIMINAL LAW 495-96 (1972) (same). The distinctions were applicable only in felony situations because accomplice liability for misdemeanors did not exist. G. DIX & M. SHARLOT, CRIMINAL LAW 368 (2d ed. 1979); S. KADISH & M. PAULSEN, CRIMINAL LAW AND ITS PROCESSES 369 (3d ed. 1975); W. LAFAVE & A. SCOTT, CRIMINAL LAW 495-98 (1972).

[2] At common law, an accessory was categorized as either an accessory before the fact or an accessory after the fact. The former procured, counseled, or commanded the principal in the crime; the latter comforted or assisted a known felon after the crime was committed. *See* 4 W. BLACKSTONE, *supra* note 1, at *36-37 (discussing the types of accessories); J. MILLER, HANDBOOK OF CRIMINAL LAW 236-44 (1934) (same).

[3] Neither the first nor the second principal actually had to be present at the situs of the crime. Where the first degree principal guided or left some instrument that caused the criminal result, or the second degree principal aided and abetted the principal in the first degree from a distance, both could be held constructively present. W. LAFAVE & A. SCOTT, *supra* note 1, at 497.

[4] 1 C. TORCIA, WHARTON'S CRIMINAL LAW § 38 (14th ed. 1978).

principal in the second degree.[5] Although both principals and accessories were punishable to the same degree,[6] the manner of proving guilt differed sharply among several distinct categories of accomplices.[7] For example, because an accessory before the fact was not at the scene of the crime, it was necessary to prove affirmatively his intent, and this usually was done by showing that he had a personal stake in the criminal venture.[8] On the other hand, since the principal in the second degree (also termed aider and abettor) was at the scene of the crime, his intent was inferred from his presence and actions if he acted with knowledge that he was contributing to a criminal venture.[9]

Strict adherence to this scheme of classification gave rise to technical rules of jurisdiction and procedure that often allowed an accomplice to go free despite overwhelming evidence of his guilt.[10] In an attempt to overcome these problems, Congress[11] and many state legislatures[12] enacted revised criminal codes that seemed to abrogate all distinctions between accessories before the fact and principals. More important, some of these revised statutes grouped accessories before the fact and principals in the second degree together under the general term "aider and abettor."[13] In applying these statutory revisions to actual cases, however, courts found it necessary to refer to the common law to define the *mens rea* requirements for accomplice liability.[14] By failing to analyze adequately the common law distinctions between parties to a felony, the courts have created a continuing controversy concerning the *mens rea* requirements for accomplice liability.

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[5] *Id.*

[6] *See generally* Perkins, *Parties to Crime*, 89 U. PA. L. REV. 581, 613 (1941) (discussing punishment of principals).

[7] Early writers defined parties according to the manner in which they participated in criminal conduct without mentioning the *mens rea* requirements. Principals were defined as direct participants, and accessories before the fact were defined as instigators. 4 W. BLACKSTONE, *supra* note 1, at *34; M. HALE, PLEAS OF THE CROWN: A METHODICAL SUMMARY 215-16 (C.P. Glazebrook ed. 1972).

Blackstone seems to indicate, however, that the community of unlawful intent was necessary only in the case of the accessory before the fact, and the second degree principal's guilt was determined independently of the other parties. 4 W. BLACKSTONE, *supra* note 1, at *36. This is not to say that there were never circumstances where a community of unlawful intent was necessary in determining the guilt of a principal in the second degree. There were times when the principal in the second degree aided the actual perpetrator by his mere presence at the scene of the crime; thus, it was necessary to prove that he was present pursuant to a prior agreement to aid. G. WILLIAMS, CRIMINAL LAW 353 (2d ed. 1961).

[8] *See* United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (accessory must associate with the criminal venture).

[9] *See* Morei v. United States, 127 F.2d 827, 836 (6th Cir. 1942) (in some instances, inference can be drawn that one who drives an automobile used in commission of a crime has knowledge; here no such inference could be drawn).

[10] Jurisdictional problems arose because trial could be held only at the situs of the crime. The situs of the crime was usually defined as the situs of the acts that made the accessory liable, rather than the state where the ultimate crime occurred. Procedural problems resulted when there was a variation between the charge and the proof. For instance, if the defendant was charged as an accessory before the fact, the evidence introduced at trial had to indicate the degree of participation in the crime. If the evidence showed participation as a second degree principal, the defendant would be acquitted.

The position that the controversy stems from a misunderstanding of the common law distinctions is supported and explained in Part I by a discussion of the origins and development of *mens rea* requirements for accomplice liability. Part I will be-

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Another troublesome rule required that the principal be convicted before the accessory. For a thorough discussion of the jurisdictional and procedural implications of the common law classification of parties, see Perkins, *supra* note 6, at 609-14.

[11] 18 U.S.C. § 2(a) (1976) provides that anyone who "aids, abets, counsels, commands, induces or procures" the commission of a federal crime is a principal. This statute, in effect, treats an accessory before the fact like a principal. The classification of accessory after the fact was retained, however, in 18 U.S.C. § 3 (1976).

[12] *E.g.*, ARIZ. REV. STAT. ANN. § 13-304 (1978) (non-conviction of principal is no defense for an accessory); CONN. GEN. STAT. ANN. § 53a-9 (West 1972) (same); MISS. CODE ANN. § 97-1-3 (1972) (accessory before the fact deemed a principal regardless of whether principal convicted previously); S.C. CODE § 16-1-50 (1977) (accessory before the fact may be convicted regardless of whether the principal has been convicted); *see* MODEL PENAL CODE § 2.04(b), Comment, at 38-39 (Tent. Draft No. 1, 1953) (accessory before the fact may be convicted even though principal has been acquitted).

[13] *E.g.*, 18 U.S.C. § 2 (1976) (aiders and abettors include those traditionally classified as accessories before the fact and as second degree principals); Illinois Criminal Code of 1961 § 5-2(c), ILL. ANN. STAT. ch. 38, § 5-2(c) (Smith-Hurd 1972) (same); 18 PA. CONS. STAT. ANN. § 306 (Purdon 1973) (same). Mississippi and many other states have adopted legislation which declares that accessories before the fact are principals. MISS. CODE ANN. § 97-1-3 (1972). Other forms of legislation have been adopted that produce substantially the same results. For instance, some statutes "maintain the common law classifications but provide that conviction of the principal is not a pre-condition to the prosecution of an accessory before the fact." W. LAFAVE & A. SCOTT, *supra* note 1, at 500.

[14] *See, e.g.*, Morei v. United States, 127 F.2d 827, 830 (6th Cir. 1942) (common law definition of principal in second degree); People v. Bracken, 68 Ill. App. 2d 466, 216 N.E.2d 176, 179 (1966) (common law definition of accessory before the fact); Commonwealth v. Leach, 455 Pa. 448, 317 A.2d 293, 294 (1974) (same).

gin with a discussion of the approach taken in the federal courts, but will include various state court approaches as well. The legal and public policy aspects of the controversy will be addressed in Part II of this article. Finally, Part III will undertake an analysis of possible solutions to the controversy. The first solution is based on the nature of the assistance given by the accomplice, while the second solution involves the creation of a bi-level standard of proof in conjunction with a bi-level penalty.

I. ORIGINS AND DEVELOPMENT OF THE CONTROVERSY

A. *Early Developments in the Federal Courts*

The controversy concerning the *mens rea* requirements for accomplice liability in the United States is framed by two decisions rendered in United States courts of appeals. In *United States v. Peoni,*[15] the Second Circuit adopted a very restrictive position. Peoni had been convicted as an accessory to the possession of counterfeit money. The charges stemmed from Peoni's sale of counterfeit bills to Regno, who subsequently sold the bills to Dorsey. All three persons knew the bills were counterfeit, and the only pertinent question was whether Peoni could be found guilty as an accessory to Dorsey's possession.[16] After reviewing the history of accomplice liability under federal statutory law and English common law,[17] the court concluded that a "purposive attitude" to promote criminal conduct was a requisite to imposition of accomplice liability.[18] The court determined that Peoni's sale of the bills to Regno did not exhibit a "purposive attitude" to promote Dorsey's possession of the bills, and thus reversed his conviction.[19]

In recognizing that Peoni might have been Regno's accessory, however, the court admitted that liability as an accessory would be possible even in the absence of direct evidence that the accomplice had a specific intent to contribute to the crime.[20] In such a situation, the intent would have to be inferred from an association with the venture. Thus, the Second Circuit established a test for proof of accomplice liability that could be met either by a substantial association with the criminal venture or direct evidence of a specific intent to contribute to the success of the criminal venture.

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[15] 100 F.2d 401 (2d Cir. 1938).

[16] *Id.* at 401-02.

[17] *Id.* at 402-03.

[18] *Id.* at 402. The court argued that the statutory and English definitions were based not on the probability that a criminal act would result from the accessory's conduct; rather, they required that the accessory participate in the crime "as in something that he wishes to bring about, that he seek by his action to make it succeed." *Id.*

[19] *Id.* at 402-03.

A less restrictive approach was taken by the Fourth Circuit in *Backun v. United States*,[21] in which the defendant had been convicted as an accomplice of transporting in interstate commerce merchandise that he knew had been stolen. The proof showed that Backun had sold the merchandise in New York to a person who transported it to North Carolina for resale. Because the *corpus delicti* of the crime was the transportation, the determinative fact was that there was no market for the merchandise in New York, and an implied condition of the sale was the transportation of the merchandise across state lines.[22] The court reasoned that since the ordinary citizen has a moral obligation to prevent the commission of a felony, if the citizen provides aid with knowledge that the aid will assist the commission of a felony, he should be held liable as an accomplice, regardless of whether he had a specific intent to facilitate the commission of the crime. In this respect, the *Backun* court rejected the *Peoni* approach of limiting accomplice liability to those who associate themselves in the criminal venture or purposely seek to bring about the success of the crime, and instead formulated a test based on assistance given by the accomplice with knowledge of the criminal purpose.[23]

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[20] *Id.* at 403. The court left open the possibility that Peoni might have been an accessory to Regno's possession because giving him the bills would have exhibited a "purposive attitude" to bring about that possession. Since Dorsey was a step further down the chain of possession, however, the court found the evidence insufficient to show that Peoni purposely sought to bring about Dorsey's possession. *Id.* at 402-03.

[21] 112 F.2d 635 (4th Cir. 1940).

[22] *Id.* at 638.

[23] *Id.* at 636-37. The court did not totally reject the "stake in the criminal venture" criterion for accomplice liability, it simply refused to limit liability to those who had a stake. Those who aided what they knew to be a criminal enterprise were equally guilty, regardless of the presence of a personal stake. *Id.*

The *Backun* and *Peoni* cases not only exemplify the controversy, but also belie the basic problem in modern attempts to arrive at an acceptable definition of *mens rea* requirements in accomplice liability. This problem results from an incorrect application of the common law distinctions confusing the proof requirements for accessories before the fact and principals in the second degree. The *Peoni* court set forth the "purposive attitude" test, applicable at common law only to accessories before the fact, as the test for all accomplice liability. On the other hand, the *Backun* court applied the knowledge standard, applicable at common law only to principals in the second degree, to an accessory before the fact. Thus, the net effect of the *Backun* and *Peoni* decisions is a disregard for the distinctions in proof requirements for accessories before the fact and principals in the second degree.

Since the United States Supreme Court's decision in *Nye & Nissen v. United States*,[24] the approach of the federal courts has been substantially in line with *Peoni*.[25] In *Nye & Nissen*, a corporation and several of its principals were convicted of conspiring to defraud the government and of filing false statements. In affirming the conviction of one of the principals of the corporations, the Court held that imposition of accomplice liability depended upon a showing that the defendant associated himself in the criminal venture.[26] Despite this definitive statement, the Fourth Circuit still adheres, at least in dicta, to its position that knowledge alone might support the imposition of accomplice liability.[27]

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[24] 336 U.S. 613 (1949).

[25] *See, e.g.*, United States v. Greer, 467 F.2d 1064, 1069 (7th Cir. 1972) (showing of specific intent to aid in crime required), *cert. denied*, 410 U.S. 929 (1973); United States v. Bryant, 461 F.2d 912, 919-20 (6th Cir. 1972) (defendant's knowledge and presence are not enough, he must have specific intent); United States v. Kelton, 446 F.2d 669, 671 (8th Cir. 1971) (crime of aiding and abetting requires specific intent); United States v. Tijerina, 446 F.2d 675, 677 (10th Cir. 1971) (more than mere presence required, must show knowledge and intent).

Prior to its decision in *Nye & Nissen*, the Supreme Court had adopted a similar position in several cases based on theories of conspiracy very similar to theories of accomplice liability. *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 709 (1943) (defendant not only knew of illegal conduct, but actively aided in its commission); United States v. Falcone, 311 U.S. 205, 210-11 (1940) (defendant must know of conspiracy; knowledge of some illegal acts not sufficient).

A majority of states also follow the aiding with intent approach. *See, e.g.*, State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976) (active participation must be shown; knowledge and presence not sufficient); State v. Irby, 423 S.W.2d 800, 803 (Mo. 1968) (defendant must be associated with criminal venture); State v. Harrison, 81 N.M. 324, 466 P.2d 890, 893 (Ct. App. 1970) (defendant must share the criminal intent of the principal); Hawpetoss v. State, 52 Wis. 2d 71, 187 N.W.2d 823, 826 (1971) (defendant must intend that his conduct assist some criminal act).

B. *State Court Approaches to the Problem*

The Model Penal Code[28] and many states[29] have adopted the "purpose" standard of accomplice liability as delineated in *Peoni.* For a person to be classified as an accomplice under the Model Penal Code, he must solicit, agree, or attempt to aid another in the commission of an offense for the purpose of promoting or facilitating the commission of the offense. Although many state criminal codes contain identical or similar language, they vary regarding the use of the words "intent" and "purpose." The definitional aspects of these rules, however, are not as important for the purpose of analysis as are the patterns of construction exhibited by the state courts, which are not always consistent with the statutory definitions of aiding and abetting. For purposes of analysis, the state court decisions concerning the minimal requirements for accomplice liability are divided into four categories: (1) those requiring proof of purposeful conduct; (2) those requiring proof of a pecuniary interest or conspiracy; (3) those allowing an inference of intent from knowledge and circumstantial evidence; and (4) those requiring knowledge only.

1. Proof of Purposeful Conduct Approach

Courts in New York and New Jersey, in an attempt to adhere strictly to the principles of *Peoni*, have confused common law concepts of accomplice liability. The confusion, generated by an unquestioned adherence to *Peoni* without understanding clearly the common law concept of accomplice liability, is illustrated vividly in two cases emanating from the appellate courts in those states. In the New York case of *People v. Clarke*,[30] the appellant gave a gun to a friend, who, in the appellant's presence, gave the gun to a third person who they knew was planning to commit a robbery. Since the appellant did not share in the proceeds of the robbery, the court reasoned that he did not have an association with or a stake in the criminal venture sufficient to evidence a purposive attitude to assist in the commission of the crime.[31] In this respect, it might be said that the New York court extended the "purpose requirement" to unreasonable proportion, except that the appellant was also amenable to felony charges under the New York "facilitation" statute then in effect.[32] This case illustrates the problems of basing a general rule of liability on a rationale that was designed to deal with a specific stituation. The New York court has repeated the *Peoni* mistake of defining accomplice liability in terms that reflect the common law *mens rea* requirements for accessories before the fact, while ignoring the common law requirements for principals in the second degree.

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[26] 336 U.S. at 619-20.

[27] *See* United States v. Eberhardt, 417 F.2d 1009, 1013 (4th Cir. 1969) (knowledge of unlawful purpose sufficient).

[28] MODEL PENAL CODE § 2.06(3)(a), at 33 (Proposed Official Draft 1962).

[29] *E.g.*, ARK. STAT. ANN. § 41-303 (1977) (accomplice must act with the purpose of promoting the offense); CONN. GEN. STAT. ANN. § 53a-8 (West 1972) (accomplice must act intentionally to cause another to commit a crime); DEL. CODE. ANN. tit. 11, § 271 (1979) (accomplice must intend to promote or facilitate the offense); GA. CODE ANN. § 26-801 (1977) (same); HAWAII REV. STAT. § 702-222 (same); Illinois Criminal Code of 1961, § 5-2, ILL. ANN. STAT. ch. 38, § 5-2 (Smith-Hurd 1961) (same).

New Jersey apparently has made the same mistake. In *State v. Sims*,[33] several codefendants had been convicted of aiding and abetting one another in an attempt to murder two police officers. Although the defendants were at the scene, armed, and acting in concert,[34] the New Jersey court reversed the convictions because the jury had not been instructed properly. Specifically, the court held that accomplice liability may not be imposed unless a "community of purpose" is found between the principal and the accomplice.[35] Since at common law this element applied only to accessories before the fact, the court clearly ignored the fact that the accomplices in *Sims* were at the scene of the crime and, thus, would have been convicted at common law as principals in the second degree.

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[30] 43 A.D.2d 834, 351 N.Y.S.2d 14, 15 (App. Div. 1974); *accord*, People v. La Belle, 18 N.Y.2d 405, 412, 222 N.E.2d 727, 730-31, 276 N.Y.S.2d 105, 110 (1966) (intent required to establish liability for aiding and abetting); People v. Monaco, 14 N.Y.2d 43, 46, 197 N.E.2d 532, 535, 248 N.Y.S.2d 41, 44 (1964) (must show personal design to kill); People v. La Bruna, 66 A.D.2d 300, 414 N.Y.S.2d 380, 381 (App. Div. 1979) (accessory must share intent of principal actor to be held liable for crime by actor).

[31] 351 N.Y.S.2d at 15.

[32] The facilitation statute created a separate crime with reduced punishment for one rendering aid, believing that the recipient of the aid intends to commit a crime. N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980). For a discussion of New York's facilitation statute, see notes 116 through 143 and accompanying text *infra*.

[33] 140 N.J. Super. 164, 355 A.2d 695, 700-01 (1976).

A major problem with this approach is the imposition upon prosecutors of an almost unattainable level of proof in *all* accomplice situations. Proof of a purposive attitude is almost entirely dependent upon circumstantial evidence. In most states, if the prosecution relies upon circumstantial evidence to prove an element of a crime it will be required to prove its case not only beyond a reasonable doubt, but also to the exclusion of every reasonable hypothesis consistent with innocence.[36]

For example, in the Florida case of *Douglas v. State,*[37] the defendant had been convicted as an accomplice to an assault and robbery. The proof showed he waited in the getaway car as his companion actually committed the crimes, and he drove the car away.[38] The Florida court reversed the conviction because, in light of the defendant's argument that he was an innocent bystander, the evidence did not clearly show a purposive attitude to aid the commission of the crime.[39] Thus, under Florida's application of the law the defendant was released, whereas under common law he would have been denominated a principal in the second degree, and intent would have been inferred from his presence and assistance at the scene of the crime.

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[34] 355 A.2d at 697.

[35] *Id.* at 700-01. The appellate court misconstrued not only the common law *mens rea* requirement for accomplices, but also an earlier decision by the New Jersey Supreme Court, State v. Madden, 61 N.J. 377, 294 A.2d 609 (1972). *Madden* held that if several persons participate in an assault resulting in death, the participants might be guilty in "different degrees depending upon their respective participation and intent." 294 A.2d at 616.

[36] *See, e.g.*, Lockett v. State, 262 So. 2d 253, 254 (Fla. Dist. Ct. App. 1972) (where proof rests solely upon circumstantial evidence, proof must not only be consistent with guilt, but also inconsistent with any other reasonable hypothesis).

[37] 214 So. 2d 653, 654-55 (Fla. Dist. Ct. App. 1968).

[38] *Id.* at 654.

[39] *Id.* at 655; *cf.* State v. Vesey, 241 N.W.2d 888, 891 (Iowa 1976) (sufficient that circumstantial evidence excludes any rational hypothesis of innocence).

2. Pecuniary Interest or Conspiracy Approach

Several states have adopted standards of proof for aiding and abetting that depend upon a showing that the defendant was to receive some pecuniary gain for his assistance in the crime or was associated in some other way with a criminal conspiracy. For example, in *Commonwealth v. Harvard*,[40] the Massachusetts Supreme Court reversed the conviction of a defendant for arranging an illegal narcotics transaction because the defendant had acted only as an intermediary between the seller and buyer and had received no pecuniary benefits for his efforts.[41] The Oklahoma Supreme Court reached a similar result in *Jones v. State*,[42] holding that an intermediary agent who received no financial benefit could not be convicted as an aider and abettor unless he was a member of a conspiracy.[43]

Both *Jones* and *Harvard* ignored or downplayed the question whether the accomplices actually instigated the sales or merely responded to requests for assistance by buyers seeking a seller.[44] This should have been the key issue in the case, rather than whether a conspiracy existed between the defendants and sellers or whether the defendants had a pecuniary interest in the sales. The reasoning of the courts reflects a concern with facts having little or no bearing on the proof requirements for aiding and abetting illegal narcotics transactions. The facts upon which the courts relied, however, are determinative of whether a defendant will be allowed to escape liability under what is known as the "accommodation agency" or "procuring agent" defense.[45] When the evidence indicates that an intermediary acted at the behest of an undercover agent, the intermediary is not a "seller," since he acted for the buyer. If the intermediary, however, was in business with the seller or acted as the seller's agent, he will be liable even though he acted as a procuring agent. Therefore, the inquiry into whether a conspiracy existed or whether the agent received financial renumeration should be for the purpose of determining if the procuring agent defense is available to the defendant, rather than for determining the evidence necessary to prove aiding and abetting. In this respect, the *Jones* and *Harvard* decisions are based on a faulty premise which ignores the theoretical and purposeful distinctions between conspiracy and accomplice liability. This strained construction of the accomplice statutes results from the lack of a viable alternative for dealing with persons whose acts do not approach the same degree of approbation as do the acts of their principals.

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[40] 356 Mass. 452, 253 N.E.2d 346, 349 (1969).

[41] 253 N.E.2d at 347-48. *But see* United States v. Manna, 353 F.2d 191, 192-93 (2d Cir. 1965) (conviction as an accomplice not dependent upon monetary gain).

[42] 481 P.2d 169 (Okla. Crim. App. 1971).

[43] *Id.* at 173. Although the court used the terms "common scheme" or "conspiracy" in the disjunctive sense, the requirements under either theory are the same: the defendant must have an interest in the sale or be hired by the seller to promote the sale. *Id.; see* Backun v. United States, 112 F.2d 635, 637 (4th Cir. 1940) (defendant's profit from sale of stolen goods led to criminal liability); United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938) (aiding and abetting requires purposive attitude and stake in outcome of the criminal venture); State v. Ortega, 77 N.M. 7, 419 P.2d 219, 227 (1966) (aiding and abetting requires partnership in the crime).

[44] In both *Jones* and *Harvard* the states' evidence indicated the defendants had initiated the narcotics transaction. 481 P.2d at 172; 253 N.E.2d at 348.

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[45] The procuring agent defense originally was available under national and state prohibition acts. United States v. Moses, 220 F.2d 166, 169 (3d Cir. 1955). For a discussion of the procuring agent defense under the prohibition laws, see Annot., 24 L.R.A.N.S. 268, 268-70 (1910) (list of cases in which procuring agent defense was allowed and denied); Annot., 28 L.R.A.N.S. 334, 334-35 (1910) (same). It provided an affirmative defense for persons who acted as agents of a purchaser but earned no profit from the sale. *See, e.g.*, United States v. Moses, 220 F.2d 166, 168 (3d Cir. 1955) (introducing the buyer to the seller and vouching for the seller was not selling); United States v. Sawyer, 210 F.2d 169, 170 (3d Cir. 1954) (defendant who, acting on buyer's behalf, made purchase and delivered to buyer, was not a seller); People v. Branch, 13 A.D.2d 714, 213 N.Y.S.2d 535, 535 (1961) (defendant who acted solely as buyer's agent and received no pecuniary gain not a seller). *See also* 22 U. KAN. L. REV. 272, 275 (1974) (procuring agent defense available only to non-seller acting as agent of buyer without personal profit).

The accommodation agency defense was available to a defendant who made a purchase of narcotics in accommodation of an undercover agent. *See, e.g.*, Durham v. State, 280 S.W.2d 737, 739 (Tex. Crim. App. 1955) (because she received no remuneration, defendant's actions were not as seller but merely as agent).

Federal narcotics laws, 21 U.S.C. §§ 802(8), (11), 841(a)(1) (1976), and many state drug laws, *e.g.*, MISS. CODE ANN. § 41-29-105(g) (Supp. 1980) (delivery includes all actual and attempted transfers), *and* TEX. STAT. ANN. art. 4476-15 § 1.02(8) (1976) (same), have abolished the defenses by making it illegal to distribute narcotics by sale, gift, or otherwise. *See* United States v. Hernandez, 480 F.2d 1044, 1046 (9th Cir. 1973) (federal statutes exclude the procuring agent defenses entirely); Posey v. State, 515 S.W.2d 286, 288 (Tex. Crim. App. 1974) (accommodation agent defense not allowed because defendant failed to prove she knew she was acting for undercover agent).

The preceding discussion is not intended to criticize the courts for failing to adhere to distinctions between the law of procuring agent and aiding and abetting, but rather is intended to illustrate the dangers inherent in a system which forces appellate courts to engage in doctrinal manipulations to ameliorate the harsh and sometimes unfair effects of present laws. In *Jones*, the confusing evidence did not indicate that the defendant deserved to be punished as a seller of drugs. The jury, presented with clear evidence of at least some guilt[46] and confronted with the decision to acquit or convict, followed the trial court's instructions and convicted the defendant. The appellate court, realizing that the defendant did not deserve the harsh penalties attached to the crime, faced a dilemma: the jury had convicted the defendant under the law as it was presented, and the appellate court, seeking to ameliorate the harshness of that decision, was forced to find a mistake of law. In its attempt to find a mistake of law, the court confused the related but distinct concepts of procuring agents and aiding and abetting. The answer to the problem is to revise the law of accomplice liability so that it reflects realistically the degree of culpability and wrongdoing of each party to a crime, imposing penalties appropriate to each of those degrees.

3. Inference of Intent from Circumstantial Evidence Approach

One group of cases has held that the intent required for the imposition of accomplice liability may be inferred from circumstantial evidence. These cases hold that, once knowledge is proved, the slightest circumstantial evidence indicating purposeful actions will suffice for a finding of intent.

In *State v. Dirgo*,[47] a conviction for robbery by means of aiding and abetting was based upon circumstantial evidence that placed the appellant in the victim's apartment and linked him to the stolen property and getaway car.[48] The Nebraska Supreme

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[46] *See* note 44 *supra*.

[47] 196 Neb. 36, 241 N.W.2d 351 (1976).

[48] 241 N.W.2d at 353-54.

Court found this evidence sufficient to permit the jury to find not only that Dirgo was involved in the robbery, but also that he acted in furtherance of the common design. The court simply reasoned that evidence of the defendant's presence at the scene of the crime, along with other circumstantial evidence of his participation in the crime, was sufficient to prove intent.[49]

Although the Nebraska court's reasoning in the *Dirgo* case is an acceptable position, the failure by many courts to establish more definite guidelines provides great potential for abuses. In *State v. Irving*,[50] the appellant was convicted of aggravated robbery as the driver of the getaway car. The evidence showed that the appellant went to the scene of the crime to dissuade his brother from committing the robbery, and drove the robbers away only after they jumped into his car when the police began shooting.[51] The conviction, based entirely on circumstantial evidence on the issue of intent, was affirmed by the Kansas Supreme Court.[52]

4. The Knowledge Only Approach

In England, providing articles essential to the commission of a crime with knowledge that they are to be used for unlawful purposes is sufficient to constitute aiding and abetting.[53] This assumption arises not because intent does not have to be proved, but rather because there is a presumption that a person intends to bring about the "natural and probable consequence of his acts."[54]

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[49] *Id.* at 354.

[50] 212 Kan. 735, 538 P.2d 670 (1975).

[51] 538 P.2d at 673.

[52] *Id.* at 674.

[53] National Coal Bd. v. Gamble, [1959] 1 Q.B. 11, 23.

[54] *Id. National Coal Board* attempted to divorce the concept of criminal intent from knowledge. Some English cases recognize the concept of oblique intention. This concept is applicable when a consequence, although not directly intended by the accused, was foreseen by him either as a substantial likelihood or probable result. *E.g.*, Regina v. Bullock, [1955] 1 W.L.R. 1, 5 (1954) (car loaned with knowledge of intended illegal use); Rex v. Stearne, [1947] 1 K.B. 997, 1003 (presumed intent to assist wartime enemy by broadcasting in Germany). *See generally* P. JONES & R. CARD, INTRODUCTION TO CRIMINAL LAW 32-33 (8th ed. 1976) (discussing oblique intention).

Oblique intention, however, can be characterized as first degree knowledge. Where a

California, after many years of uncertainty,[55] appears to have moved toward a similar theory of accomplice liability. The present theory began to evolve in 1966 in *People v. Samarjian*,[56] a court of appeals decision holding that evidence that the defendant forged parimutuel betting tickets, knowing they were to be used as genuine tickets, was sufficient to support a charge of aiding and abetting.[57] Subsequent opinions by courts of appeals, however, equivocated on the issue of *mens rea* in accomplice liability; at least one case required the same intent required for the crime itself,[58] while another case required aiding with knowledge of the perpetrator's criminal intent.[59] In 1974, the California Court of Appeals held in *People v. Standifer*[60] that conviction as an aider and abettor required only a finding that the defendant intended to aid an act which he knew was criminal.[61]

The *mens rea* requirement for accomplice liability in California was crystallized in *People v. Germany*.[62] Appellant Ger-

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party has first hand knowledge of the circumstances, he is presumed to "act intentionally in relation to them." Roper v. Taylor's Central Garages (Exeter), Ltd., 2 T.L.R. 284. Some scholars believe it is wrong to punish oblique intention in the same manner as desire in all cases. It has been pointed out, for instance, that under the moral doctrine of double effect, a person is less culpable for the unintended effects of his actions even if he must have known they would occur. P. JONES & R. CARD, *supra*, at 32.

Likewise, many states have abandoned the use of the term intent and now define mental elements solely in terms of purpose or knowledge. *E.g.*, CONN. GEN. STAT. ANN. § 53a-10 (West 1972) (affirmative defense that there was complete and voluntary renunciation of criminal purpose allowed). *Contra, e.g.*, MISS. CODE ANN. § 97-1-5 (1972) (knowledge and intent requirement). Under the Model Penal Code's definitions, a person acts purposely when he consciously desires to bring about a certain result; a person acts knowingly when he is aware to a practical certainty that his conduct will bring about a certain result. MODEL PENAL CODE § 2.02(2)(a)-(b), at 25-26 (Proposed Official Draft, 1962).

From the preceding discussion, it is apparent that regardless of the label a court gives the mental element in accomplice liability cases, what is actually required and described by courts is knowledge as defined in earlier English decisions, the Model Penal Code, and many state statutes.

[55] *See* People v. Standifer, 38 Cal. App. 3d 733, 743-44, 113 Cal. Rptr. 653, 660 (1974) (prior case law inconsistent).

[56] 240 Cal. App. 2d 13, 49 Cal. Rptr. 180 (1966).

[57] 49 Cal. Rptr. at 185.

[58] People v. Vasquez, 29 Cal. App. 3d 81, 87, 105 Cal. Rptr. 181, 184 (1972).

[59] People v. Herrera, 6 Cal. App. 3d 846, 852, 86 Cal. Rptr. 165, 168 (1970).

[60] 38 Cal. App. 3d 733, 113 Cal. Rptr. 653 (1974).

[61] *Id.* at 743, 113 Cal. Rptr. at 660.

[62] 42 Cal. App. 3d 414, 116 Cal. Rptr. 841 (1974). It crystallized it in the sense that

many was convicted of voluntary manslaughter on the theory that he aided and abetted a killing by giving the actual perpetrator a weapon. The appellate court affirmed the conviction, holding that aid given with knowledge of the principal's criminal purpose and criminal intent was sufficient to impose accomplice liability.[63]

The approach adopted by California is progressive and logical in its concentration on the wrongful acts of the aider and abettor and in his independent state of mind when committing those acts. On the other hand, the approach remains problematic because it bases the liability and punishment of the aider and abettor on the substantive crime committed by the principal wrongdoer.[64] The effect of this position is to hold the person liable as a principal if he aids and abets with knowledge that the principal intends to commit a crime. In essence, this approach establishes a different offense of aiding and abetting for proof purposes, but for punishment purposes it ignores the different offense. Although the proof requirements are based on the personal culpability of the aider and abettor, punishment is derivative in the sense that it is based upon the *principal's* wrongdoing.[65] The net effect of this approach is a very relaxed standard of proof for aiding and abetting with a very rigid and highly penal system of punishment.

II. PROBLEMS INVOLVED IN THE DECISION TO ADOPT KNOWLEDGE AS THE *MENS REA* REQUIREMENT IN ACCOMPLICE LIABILITY

A. *Knowledge: Definition and Proof*

It is apparent that knowledge will play a significant role in any legislative reform in the area of accomplice liability; there-

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it clarified the kind of intent that must be proved: the intent requirement for accomplice liability in California refers to the aid given rather than the underlying offense.

[63] *Id.* at 420, 116 Cal. Rptr. at 845.

[64] *See, e.g., id.* at 419-20, 116 Cal. Rptr. at 844-45 (accomplice to murder and actual perpetrator both found guilty of voluntary manslaughter); People v. Standifer, 38 Cal. App. 3d at 744, 113 Cal. Rptr. at 661 (refusal of manslaughter instruction to aider and abettor inside house when principal killed victim outside).

[65] *See* R. PERKINS, CRIMINAL LAW 656-68 (2d ed. 1969) (distinguishing between degrees of wrongdoing by the principal).

fore, it is appropriate to examine the problems involved in defining and proving knowledge. Initially, it should be recognized that knowledge is not a concept foreign to the criminal law, although it has at times been confused with intent. Knowledge in the law is not equated with its ordinary meaning because it usually is determined after the fact and by circumstantial evidence. The search for knowledge in the criminal law has been characterized aptly by Professor Perkins:

> For most practical purposes "knowledge" "is not confined to what we have personally observed or to what we have evolved by our own cognitive faculties. . . ." The need, therefore, is to search for the state of mind, or states of mind, which the courts have spoken of as "knowledge" for the purpose of a particular case.[66]

With this conception of knowledge in mind, Perkins devised a scheme of classifying legal knowledge based on past judicial decisions. The pertinent section of the scheme is: "(1) guilty knowledge [awareness of the fact as a result of personal observation], (2) guilty belief, [which is correct], (3) guilty avoidance of knowledge."[67]

Although Perkins defines "guilty knowledge" in his scheme as awareness of a fact as a result of personal observation, it should be understood that this is not proof of actual knowledge. This statement means that an inference can be drawn that a person had guilty knowledge of a fact because he observed that fact. It seems safe, however, to rule out "knowledge based upon personal observation" as a standard for accomplice liability because the very nature of this theory of liability requires that aid be given to a person who will commit a crime in the future.[68] If aid is given after the crime is committed, the aider is not considered an accomplice, rather, he is considered an accessory after the fact or the harborer of a fugitive. Even if the principal informs his accomplice that he intends to commit a crime, the accomplice does not have actual knowledge that he will commit the crime, although he might have an actual belief.

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[66] *Id.* at 775 (footnote omitted) (quoting State v. Ransberger, 106 Mo. 135, 17 S.W. 290, 292 (1891)).

[67] R. PERKINS, *supra* note 65, at 775.

[68] In endorsing this conclusion, one commentator distinguished between the type of knowledge which foresees future events that need not occur and the type which foresees future events that must occur given certain data. The latter, he contended, is inapplicable where one person tries to predict another's conduct. Comment, *A New Crime: Criminal Facilitation*, 18 LOY. L. REV. 103, 113-14 (1971-1972).

A discussion of the law concerning the knowledge requirements for receiving stolen property provides some helpful insights into the problems involved in using the "belief which is correct" standard as the *mens rea* requirement for accomplice liability. Stolen property cases are particularly suited to the discussion because the theory of liability for receiving stolen property developed along the same lines as the theory of accomplice liability. Under both theories, the defendant's liability is based upon the actions of another party.[69] In accomplice liability cases, it must be determined whether the defendant had knowledge of the principal's future activities. In stolen property cases, it must be determined whether the defendant had knowledge of the principal's (seller's) past activities. The rule most often used to establish guilty knowledge in receiving stolen property cases is one requiring an actual belief that the property is stolen.[70] The mechanics of the "actual belief" test are described by LaFave and Scott:

> In most cases there is no direct testimony of the receiver's actual belief. Proof thereof must therefor be inferred from the circumstances surrounding his receipt of the stolen property. . . . The fact that he knowingly received other stolen property from the same (or even from another) thief at nearly the same time as the receipt of the stolen property in question is evidence from which it may be inferred that he had a guilty knowledge that the property in question was stolen.[71]

In determining how the above principles can be applied to situations involving accomplice liability, the following hypothetical example is helpful:

> The owner of a gun shop sells guns to anyone with money to

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[69] For a brief but informative historical discussion of the crime of receiving stolen property, see W. LaFave & A. Scott, *supra* note 1, at 682-83.

[70] *Id.* at 686.

[71] *Id.* at 686-87.

> buy them. He is aware that some of the guns he has sold have been used in the past to commit robberies. X comes into the shop and asks to purchase a gun. While in the shop and before the sale is completed, X mentions that he has a big job to pull that night. X is known to the shop owner as an ex-convict who does not work. The following day X is arrested for armed robbery. It is discovered that the weapon used in the robbery is the gun purchased the day before from the gun shop.

It would appear that under the receiving stolen property rules of proof, the evidence in this hypothetical situation merits an inference of knowledge on the part of the shop owner that X intended to use the gun to commit a crime. This is also an example of Perkins' "guilty belief which is correct" standard of knowledge.

One of the problems of determining knowledge under this approach is that if the judge is not careful in framing his instructions, he will permit the jury to convict a defendant under a purely objective test of liability.[72] This is not to say that the objective test—what an ordinary person would have believed—should not be considered by the jury, rather, it should not be the only consideration. In a criminal matter the very essence of the offense is the conscious and voluntary wrongdoing of the defendant.

It must be remembered, however, that negligence has been accepted in the criminal law as a basis of liability in some situations.[73] Therefore, negligence should be considered a possible standard for determining knowledge in accomplice liability. When negligence has been accepted, the punishment has been reduced, thereby reflecting a lesser degree of culpability on the part of the actor. The leading argument for using negligence as a basis for criminal liability is that it serves as a deterrent against certain harmful acts by inducing careless persons to reflect before they act.[74] On the other hand, it has been argued that negligence is not a conscious state of mind reflecting voluntary action, and therefore it does not deserve criminal punishment.[75]

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[72] Some states, however, including Mississippi, apply an objective test of knowledge. *E.g.*, McGlothlin v. State, 1 Md. App. 256, 229 A.2d 428, 431 (1967) (receiver knew or could reasonably have suspected property was stolen); Bennett v. State, 211 So. 2d 520, 526 (Miss. 1968) (would a reasonable man believe property was stolen).

This test has been criticized for failing to stress the distinctions between civil and criminal liability. In criminal cases, the defendant's intentional wrong is the essence of the crime. In civil cases, the defendant's failure to exercise ordinary care is tested, without any determination of intent or whether the defendant was a person of ordinary care. State v. Beale, 299 A.2d 921, 924 (Me. 1973).

[73] *E.g.*, GA. CODE ANN. § 26-1502 (1978) (recklessly damaging another's property by fire or explosives); MISS. CODE ANN. § 97-3-47 (1972) (killing resulting from culpable negligence is manslaughter).

The compromise solution has been to employ a reduced penalty when gross negligence causes great harm.[76] It follows that if one of the purposes of making knowledge a basis for accomplice liability is to prevent crimes by depriving would-be criminals of necessary aid, negligence, under the rationale given for its use in the criminal law, would be a proper basis for determining accomplice liability. Since under the objective standard of liability a person whose conduct is merely negligent is held to possess the requisite knowledge for accomplice liability, this standard is appropriate only in situations where accomplice liability based on knowledge is considered a lesser offense than the offense aided, thereby reflecting the lesser degree of culpability involved.

"Guilty avoidance of knowledge" is a culpable state of mind that suffices for knowledge in the United States[77] and England.[78] Under English law, "guilty avoidance of knowledge" is denominated "connivance" or "willful blindness."[79] The first case applying this concept was *R. v. Sleep*.[80] The question in *Sleep* was whether an accused found in possession of naval stores *knew* that they were government stores. Although the accused was convicted by a jury, the conviction was later quashed because the jury did not find that the accused either knew the stores were government stores or willfully shut his eyes to the fact.[81] Later English cases using the rule held that licensees charged with allowing gaming in their places of business could be convicted, although they did not have knowledge of gaming, if they willfully abstained from knowing.[82]

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[74] MODEL PENAL CODE § 2.02, Comments, at 123, 129 (Tent. Draft No. 4, 1955).

[75] Hall, *Negligent Behavior Should be Excluded from Penal Liability*, 63 COLUM. L. REV. 632, 635-37 (1963).

[76] *See, e.g.*, MINN. STAT. § 169.11 (West 1960) (reckless driving causing another's death is manslaughter).

[77] *See generally* United States v. Jewell, 532 F.2d 697, 700-04 (9th Cir.) (discussing use in the United States), *cert. denied*, 426 U.S. 951 (1976).

[78] *See generally* Edwards, *The Criminal Degrees of Knowledge*, 17 MOD. L. REV. 294, 298-306 (1954) (discussing use in England).

[79] *Id.* at 301.

[80] 169 Eng. Rep. 1296 (C.C.R. 1861), *discussed in* Edwards, *supra* note 78, at 298.

In the United States, the cases employing the "avoidance of knowledge" concept have usually involved illegal drug activities. In most of these cases, defendants, who did not attempt to determine the contents of the packages that they were transporting, were charged with knowingly transporting drugs.[83] In *United States v. Jewell*,[84] the defendant was charged with knowingly possessing and bringing marijuana into the United States. The evidence indicated that the defendant knew that the car he drove had a secret compartment and knew facts indicating that it contained marijuana, but he deliberately avoided personal investigation.[85] The Ninth Circuit approved the trial court's use of an instruction allowing the jury to convict the defendant on an "avoidance of knowledge" theory.[86]

Another "avoidance of knowledge" case, *United States v. Dozier*,[87] is especially pertinent to this discussion because it involved accomplice liability. Appellant Dozier was convicted of aiding and abetting the possession of cocaine with intent to distribute. Dozier's actions were limited to driving undercover agents to a rendezvous and standing guard while her friend, the principal, actually made the sale in another room to one of the agents. The Second Circuit affirmed the conviction by approving instructions allowing the jury to convict the defendant if it found that she "had a conscious purpose to avoid finding out the identity of the substance so as to close her eyes to the fact."[88]

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[81] 169 Eng. Rep. at 1302.

[82] Edwards, *supra* note 78, at 299-300.

[83] *See, e.g.*, United States v. Olivarez-Vega, 495 F.2d 827, 830 (2d Cir.) (unaware of cocaine in suitcase, but aware of suspicious circumstances), *cert. denied*, 419 U.S. 1020 (1974); United States v. Joly, 493 F.2d 672, 676 (2d Cir. 1974) (smuggled cocaine in brown paper bag concealed in belt).

[84] 532 F.2d 697 (9th Cir.), *cert. denied*, 426 U.S. 951 (1976).

[85] 532 F.2d at 699.

[86] *Id.* at 700.

[87] 522 F.2d 224 (2d. Cir.), *cert. denied*, 423 U.S. 1021 (1975).

[88] 522 F.2d at 226.

The court apparently was willing to base liability on a negligence or objective standard in narcotics cases. On a whole, however, the underlying theory of liability based on "guilty avoidance of knowledge" is a subjective one based on recklessness.[89] The defendant realizes that he is probably engaging in an illegal activity but refuses to investigate in order to avoid definite knowledge. It is reasonable to hold liable a person who realizes that his actions probably are illegal but consciously avoids finding out for sure. A danger does exist, however, when a person is held criminally liable on the "guilty avoidance of knowledge" theory on an objective basis, which was designed to deal with the reasonable prudent person in civil actions.[90] If a purely objective approach is used to determine accomplice liability under this theory, the accomplice should be punished less severely than the principal. On the other hand, if a subjective or recklessness approach is used, whereby a person is liable only if the jury finds that he deliberately avoided making certain of facts which are almost obvious, it could be the basis for full punishment.

After exploring the practical considerations involved in punishing knowing aid to one who intends to commit a crime, the next logical step is an examination of the normative questions involved in the decision whether to punish this type of conduct. Creating a separate crime to deal with those who aid and abet with knowledge alone would bring stability into a seemingly chaotic area of the law.

In the American system of criminal justice, however, one should not be punished because it is convenient to the system, but rather because a weighing of competing interests leads to the conclusion that one deserves punishment for voluntarily engaging in activities which are detrimental to organized society.

B. *Reconciling Competing Interests in the Criminal Law*

Liability in the Anglo-American system of criminal law is based on personal and individual guilt. Liability based upon accessorial conduct skirts the boundaries of criminal liability and is grounded in the idea of causal responsibility. Although the accomplice does not personally perform the illegal acts, he counsels, aids, abets or procures the illegal acts, which creates the assumption that he intends the commission of the crime. In the typical accomplice situation, all the prerequisites for criminal responsibility are met; there has been an act toward the completion of a crime—aiding and abetting—and intent has been established.[91] On the other hand, accomplice liability based on knowledge presents more difficulty. It can be argued that the moral distinction between intent and knowledge is so slight that no difference in punishment is justified. Such an argument has merit where the party being punished is the primary actor, since desire and awareness of probable consequences can be logically equated. For instance, since malice in common law murder prosecutions could be shown by proof of intent or knowledge, a person who pushed another off a bridge just to see the splash, knowing death was likely, was treated the same as the person who engaged in the same conduct with an intent to kill.[92] When a party's criminal responsibility is based upon the conduct of another, however, this desire that the principal accomplish a result is readily distinguishable from an awareness of the probable results of a course of conduct. When the aider desires the principal to commit a crime and lends his assistance to its commission, the primary actor can be seen as an agent of the accomplice. In the latter situation the attribution of responsibility is not aided by the presumption that a person intends the natural and probable consequences of his act. He does not have physical control over the primary actor's conduct,[93] and he does not engage in conduct that is inherently dangerous.

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[89] *See* Edwards, *supra* note 78, at 298, 303-06 (connivance equated with recklessness).

[90] *See* Thompson v. Green Mountain Power Corp., 120 Vt. 478, 144 A.2d 786, 789 (1958) (citing Gobrecht v. Beckwith, 82 N.H. 415, 420, 135 A. 20, 22 (1926) (voluntary ignorance is equivalent to negligence in tort cases)). *See generally* note 72 *supra*.

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[91] *See generally* notes 15 through 39 and accompanying text *supra* discussing the purpose standard of accomplice liability in federal and state courts.

[92] The *mens rea* of murder is usually called "malice aforethought," a technical term for various mental attitudes which, if present, make a particular homicide heinous enough to constitute murder. Typically, an intention to kill or grievously injure or to do an act knowing that someone will probably be killed is sufficient. J. SMITH & B. HOGAN, CRIMINAL LAW 285-86 (4th ed. 1978). Such a piecemeal definition of homicide can, perhaps, be explained by the uniqueness of homicide as a crime. One commentator observed that killing historically has been viewed as "an assault on the sacred, natural order"; only execution of the slayer could expiate the sin. G. FLETCHER, RETHINKING CRIMINAL LAW 235-36 (1978). The same commentator also noted, however, that this view clashes with the modern concept of individualized justice. *Id.*

In determining the proper *mens rea* requirement for accomplice liability, it should be remembered that all criminal law is a compromise between two fundamental interests: the interest of society in its own security, and the interest of the individual in being free unless found legally blameworthy. Proponents of the "mere knowledge" standard for accomplice liability often cite the following language from *Backun v. United States*:[94]

> It must be remembered, however, that guilt as accessory before the fact has application only in cases of felony; and since it is elementary that every citizen is under moral obligation to prevent the commission of a felony, if possible, and has the legal right to use force to prevent its commission and to arrest the perpetrator without warrant, it is difficult to see why, in selling goods which he knows will make its perpetration possible with knowledge that they are to be used for that purpose, he is not aiding and abetting in its commission within any fair meaning of those terms.[95]

It is not enough to enact a statute making conduct criminal and to provide procedures for its application. In a system where individual liberty is stressed, procedures for the enforcement of criminal laws must be designed to work in a manner that will place minimum restraints on individual activities. The decision to make conduct unlawful first must be affirmatively justified and then the appropriate penalty must be determined.

The primary justification put forth by those who would punish conduct that knowingly aids and abets the commission of a crime is that of crime prevention.[96] This goal, however, must be weighed against competing interests to ensure that it does not work a greater mischief than the harm it is designed to prevent. The method employed to prevent the outlawed conduct should be examined to determine if it can operate effectively. The primary competing interest to be considered in punishing knowing aid to those who plan to commit crimes is the protection of normally lawful activities.[97]

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[93] One theory uses the degree of hegemony and control over the criminal act as the measurement of perpetration. An accessory does not have hegemony and control over the execution of the crime; that is retained by the perpetrator. G. FLETCHER, *supra* note 92, at 655-56.

[94] 112 F.2d 635 (4th Cir. 1940).

[95] *Id.* at 637.

[96] 1 WORKING PAPERS OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS 153 (Study Draft, 1970) [hereinafter referred to as WORKING PAPERS].

Initially, this discussion will focus on the preventive aspects of making knowledge a basis for accomplice liability. When prevention is sought, the principles of deterrence come into play. Although endless debate is possible over whether the criminal sanction can serve as a deterrent,[98] it seems to be an especially apt deterrent to the would-be accomplice or facilitator. The businessman about to rent a hotel room to a known prostitute will weigh the consequences of his action if he is aware that his conduct is illegal. Deciding that the rent money is less important than the risk of losing his freedom and community standing, the legitimate businessman may decide against renting the room. When the crime is to be committed by a third person, the usual strain and immediacy involved in decision-making is not present. This places the would-be accomplice in a better position to calculate deliberately the consequences of his actions.

The general deterrent aspects of punishing persons for knowingly aiding and abetting the commission of crimes has a dual nature. On one hand, those persons who know the conduct is outlawed and will result in criminal penalties will be reluctant to engage in those activities. In addition, when the potential criminal is refused aid necessary for the successful completion of his crime, there is a chance that he will abandon his plan or be arrested. This aspect of general deterrence might work in several ways. The potential aider might be an educative or moralizing force that causes the would-be offender to change his mind. In the last resort, if the potential criminal insists on going forward with his scheme, it will be reported, in some cases, by the person from whom aid is sought. If the potential criminal is unable to obtain a gun immediately upon deciding to commit a robbery, he may never commit the robbery. If the potential aider is deterred from participating in a criminal scheme, he might also have reason to attempt to prevent the principal from committing the crime.

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[97] *See* MODEL PENAL CODE § 2.04(3), Comment, at 30-32 (Tent. Draft No. 1, 1953) (should vendor forego sale where he knows of illegal purpose of would-be customer).

[98] *See* H. HART, PUNISHMENT AND RESPONSIBILITY 17-24 (1968) (discussing excuses for criminal activity).

The above discussion tends to verify the belief that accomplice liability based on knowledge can serve as a measure of crime prevention. That, however, does not in itself justify the existence of such liability. The preventive effects must be weighed against other interests. As stated earlier, a primary concern is the possibility of placing undue restrictions on normally lawful activities, especially those of legitimate businessmen. The initial drafters of the Model Penal Code favored the interest of crime prevention over that of legitimate businessmen. The drafters viewed the situation from a very simplistic perspective: "[W]hen the only interest of the actor is his wish . . . to forego concern about the criminal purpose of others, though he knowingly facilitates in a substantial measure the achievement of such purposes, it is an interest that . . . is properly subordinated generally to the larger interest of [crime prevention]."[99] The decision, however, is not a simple one because of the potential restraints on lawful business activities. These restraints are likely to be in the form of erroneous decisions regarding unlawful use and, in many cases, a loss of business.[100] Even with these added considerations the scales remain tilted in favor of crime prevention, but realizing that these other interests are involved, preventive measures should be constructed in a manner that will accommodate them as much as possible. The New York faciliation statute[101] seems to be designed in a manner that provides maximum accommodation of the interests involved. The statute is applicable only to felonies, except when minors are involved. It requires probable belief that the actor's conduct will aid in the commission of a crime, and that the aid provided the means and opportunity for the actual commission of a crime.[102] It further provides that a person cannot be convicted on the uncorroborated testimony of the perpetrator.[103] Most important, the statute punishes a facilitator less than it does a true accomplice.[104] A statute constructed in this manner seems more suited to protecting the interest of the legitimate businessman while promoting the vital social interest of crime prevention.

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[99] Model Penal Code § 2.04(3), Comment, at 32 (Tent. Draft No. 1, 1953). This view, however, was rejected by the American Law Institute in favor of a purpose standard. Model Penal Code § 2.06(3)(a), at 33 (Proposed Official Draft, 1962).

[100] R. Perkins, *supra* note 65, at 664.

[101] N.Y. Penal Law §§ 115.00-.15 (McKinney 1975 & Supp. 1980). For a more comprehensive discussion of New York's criminal facilitation statute, see notes 116 through 140 and accompanying text *infra*.

Finally, the problem of overextending the criminal law must be considered. Replacing the intent requirement with a knowledge requirement seems to weaken the justification for accomplice liability from a systematic viewpoint, because a system based on knowledge must address the important question whether society will impose criminal penalties on actions that are sometimes only negligent in nature. It should be noted that even at common law, when knowledge and recklessness sufficed as bases for criminal liability, they were usually labelled constructive or imputed intent. Some authorities have advocated doing away with this semantical justification and replacing it with a recognition that negligent acts aiding criminal conduct should be punished criminally. For example, Professor Fletcher has pointed out that:

> Once the normative status of *mens rea* comes into focus, the problem of negligence as a form of *mens rea* is tractable. . . . In the normal case of intentional conduct, where the actor is sane and his conduct is not excused by duress or necessity, it might be sufficient in establishing *mens rea* to show that the actor acted intentionally. But surely it does not follow that intentional conduct, or something like it, is a necessary condition for criminal culpability.[105]

If the inquiry focuses on the question of culpability, the concern changes to the causal nature of the conduct rather than the actor's state of mind. A person who acts negligently deserves punishment because he should have considered the consequence of his conduct; he is punished so that he will be more careful. Therefore, it would seem that in some cases it is acceptable to punish unintentional conduct, but it should be punished less severely because the underlying crime was not willed. When the conduct is outlawed, those aspects of the criminal law designed to protect the individual's interest sometimes give way to the interest of general security. This is exemplified by legislation providing for strict liability, where intent is omitted as an element altogether.[106] Penalty provisions in strict liability statutes usually reflect a sacrifice in individual protection, but punishment is usually slight.[107] In our society, violent crime has reached such crisis proportions that requiring citizens to refrain from knowingly facilitating crime is justified even if it means a deviation from the notion of intent which is so deeply imbedded in the American concept of criminal law.

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[102] *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[103] *Id.* § 115.15 (McKinney 1975).

[104] An accomplice is criminally liable to the same degree as the person who actually committed the crime. *Id.* § 20.15. A facilitator is liable to a lesser degree than the person who actually committed the crime. *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[105] Fletcher, *The Theory of Criminal Negligence: A Comparative Analysis*, 119 U. PA. L. REV. 401, 414-15 (1971).

Once this recognition has been made, the problem of finding an appropriate penalty is presented. Professor H.L.A. Hart offers considerable wisdom in developing an answer to the problem:

> The guiding principle is that of a proportion within a system of penalties between those imposed for different offences where these have a distinct place in a commonsense scale of gravity. This scale itself no doubt consists of very broad judgements both of relative moral iniquity and harmfulness of different

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[106] *See* Morisette v. United States, 342 U.S. 246, 250-63 (1951) (discussing strict liability criminal statutes); *see, e.g.*, MISS. CODE ANN. § 63-9-11 (1972) (violations of motor vehicle regulations). The resurgence of strict liability has occurred in connection with the penalty clauses of regulatory statutes in such fields as illegal liquor sales, sales of impure food and drugs, and traffic and motor vehicle regulations. R. PERKINS, *supra* note 65, at 802.

[107] *See, e.g.*, ALA. CODE § 20-1-5 (1977) (maximum fine of $500 or six months imprisonment for adulterated food and drugs); MISS. CODE ANN. § 97-27-1 (1972) (same); S.C. CODE § 56-1-440 (1977) (maximum fine of $100 or 30 days imprisonment for driving without a license). One commentator has argued that courts should not examine the intent of parties accused of petty violations because the penalties for violations are so slight the courts can disregard the protection of individual interests in favor of protecting social interests. Sayre, *Public Welfare Offenses*, 33 COLUM. L. REV. 55, 69-70 (1933).

> types of offences: it draws rough distinctions like that between parking offences and homicide, or between 'mercy killing' and murder for gain, but cannot cope with any precise assessment of an individual's wickedness in committing a crime (Who can?) Yet maintenance of proportion of this kind may be important: for where the legal gradation of crimes expressed in the relative severity of penalties diverges sharply from this rough scale, there is a risk of either confusing common morality or flouting it and bringing the law in contempt.[108]

There can be little debate that one who wills that a crime be committed is less blameworthy than one who actively and willfully commits that crime. Therefore, a distinction should be made between one who aids with intent equal to that of the principal and one who acts with knowledge but does not take the principal crime as his own because he desires only to provide the aid regardless of its use. It follows that crimes should be separated to reflect the degree of culpability of the defendants so that those charged with like crimes will be treated in a like manner. Criminal laws should offer guidelines to the public so that conduct can be adjusted to comply with the laws. For these reasons, conduct knowingly aiding criminal activity should be distinguished from conduct that intentionally aids criminal activity.

III. PROPOSED COMPROMISE APPROACHES

From the above discussion, it is apparent that some uniform workable solution is necessary. The proposed solutions fall into two general categories: (1) the creation of two statutes, one to deal with knowledge-only situations and one to deal with purpose or intent siutations,[109] and (2) the adoption of a standard requiring only knowledge when there is substantial facilitation and requiring intent in other situations.[110]

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[108] H. HART, *supra* note 98, at 25.

[109] *E.g.*, N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980) (criminal facilitation statute). This is essentially the solution proposed by the National Commission on the Reform of Federal Criminal Laws. WORKING PAPERS, *supra* note 96, at 160-61.

[110] *See, e.g.*, MODEL PENAL CODE § 2.04(3)(b) (Tent. Draft No. 1, 1953).

Before discussing the proposed solutions, it should be noted that at least one source has suggested a third compromise solution. This suggestion is that "knowing aid should be deemed sufficient when the criminal scheme is serious in nature."[111] Under this approach, when the crime is a serious one, the need for crime prevention outweighs traditional considerations of personal culpability and personal wrongdoing in determining guilt.[112]

It must be recognized, however, that a conviction for a serious crime results in serious punishment; for this reason it is of paramount importance that guilt be based on personal culpability. As Professor Sayre recognized: "[I]t is of the very essence of our deep-rooted notions of criminal liability that guilt be personal and individual; and in the last analysis the inarticulate, subconscious sense of justice of the man on the street is the only sure foundation of law."[113] When misdemeanors are involved, moral condemnation and punishment are greatly reduced—if present at all. It would be more in keeping with American concepts of justice to resolve the conflict between the concept of individual guilt and the interest of crime prevention in favor of the latter in misdemeanor situations rather than in felony situations. This has been the case with strict liability crimes where the purpose of the statute is regulatory and unrelated to questions of moral condemnation.

It should also be noted that different considerations apply to the crime of conspiracy than to accomplice liability. Conspiracy is a relational crime that has been deemed to present a great danger to society. Since society has decided that association for criminal purposes is a crime, which usually carries a penalty less than the underlying crime, it would seem that one who knowingly aids this group activity has associated himself with the group. On the other hand, under the principles of accomplice liability, one is held fully liable for the conduct of another; therefore, his liability should be based on a different standard than that of a conspirator.[114] Finally, it should be pointed out that when serious crimes are involved, imposing accomplice liability based on aiding with knowledge is susceptible to the same problems and abuses discussed under the English and California approaches to accomplice liability.[115]

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[111] W. LaFave & A. Scott, *supra* note 1, at 509. People v. Lauria, 251 Cal. App. 2d 471, 59 Cal. Rptr. 628 (1967), is cited as the source of this suggestion. The issue addressed in the case was what circumstances warranted imputing an intent to participate in a conspiracy to a supplier of services who knew that the services were being used for an unlawful purpose. 59 Cal. Rptr. at 631-32.

[112] *See* 59 Cal. Rptr. at 634-35.

[113] Sayre, *Criminal Responsibility for Acts of Another*, 43 Harv. L. Rev. 688, 717 (1930).

A. *Creation of a Separate Facilitation Statute*

New York is the only jurisdiction that has adopted a criminal facilitation statute.[116] The tenor of the facilitation concept is that assisting or encouraging a crime with knowledge is less culpable than assisting and encouraging a crime with specific intent. The argument is that because one who wills that a crime take place is not as culpable as one who seeks to make it take place, the former deserves less punishment than the latter. The commentaries to the original New York statute indicate that it is designed to deal with the following kinds of situations: "(1) [a] person sells a gun to a man who he knows intends to kill his wife, or (2) [a] telephone company provides telephone service to a person with knowledge that he intends to use it for bookmaking purposes, . . . or (4) [a] night watchman for a warehouse looks the other way when he see [*sic*] his burglar friend about to break into the warehouse."[117] The statute is apparently designed to cover the situation of the "legitimate" businessman as well as other situations where circumstances would indicate less culpability on the part of the facilitator. Although the facilitator is not considered an accomplice under the statute dealing with accomplice liability, facilitation is a lesser included offense of aiding and abetting.[118] This gives a jury an alternative when the defendant is charged as an accomplice, but the jury does not believe he deserves to be punished as a principal. It also provides the prosecutor with a tool in the plea bargaining process when dealing with a person who would otherwise be an accomplice.[119]

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[114] The Model Penal Code's drafters advocate a unilateral approach to the conspiratorial relationship which defines conspiracy in terms of the conduct necessary to establish the liability of a particular actor rather than the liability of the group. MODEL PENAL CODE § 5.03, Comment, at 104 (Tent. Draft No. 10, 1960).

Because the Code minimizes the importance of criminal relationships, one critic has charged that it is inconsistent with the purposes of conspiracy laws—the breakup of criminal relationships before a more dangerous crime is committed. Marcus, *Criminal Conspiracy: The State of Mind Crime—Intent, Proving Intent, and Anti-Federal Intent*, 1976 U. ILL. L.F. 627, 628-29.

The crime of conspiracy, however, does provide some insights into the restructuring of accomplice liability because the proponents of the knowledge approach are concerned with preventing crime by depriving criminals of the means to commit crimes. The law should be structured in a manner that concentrates on the aider and abettor and the aid given, as in conspiracy where the law is designed to deal with group relationships. In this manner a separate crime can be formulated with its own punishment; this allows the law to be less concerned with the defendant's culpable state of mind, since it deals with the results of his acts and provides a less severe punishment.

[115] *See generally* notes 53 through 65 and accompanying text *supra*, discussing the English and California approach.

[116] N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980).

As originally formulated, the New York facilitation statute contained three major requirements or elements: (1) conduct which provides the means and opportunity for the commission of a crime; (2) actual commission of a crime by the person aided; and (3) a belief that it is probable that the aid is being rendered to one who intends to commit a crime.[120]

The drafters of the proposed federal code replaced the first of these elements with the requirement that the facilitator provide "substantial assistance," rather than "the means and opportunity," to the principal.[121] Although the whole purpose of formulating a standard is to provide jurors with some guidelines, the drafters admitted that the "substantial assistance" requirement is a vague standard.[122] Nevertheless, the drafters of the proposed federal code indicated that "substantial assistance" was preferred over "means and opportunity" because "substantial assistance" has been the standard used in federal courts.[123]

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[117] *Id.* § 115.00 Commentaries (McKinney 1975).

[118] *See* note 104 *supra.*

[119] *See* Sobel, *The Anticipatory Offenses in the New Penal Law: Solicitation, Conspiracy, Attempt and Facilitation*, 32 BROOKLYN L. REV. 257, 271 (1966) (facilitation statute allows prosecutor to charge accomplice as facilitator); Comment, *supra* note 68, at 114 (plea bargaining only value).

[120] N.Y. PENAL LAW §§ 115.00-.05 (McKinney 1975) (amended 1978).

[121] FINAL REPORT OF THE NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAWS § 1002, at 68 (1971) (proposed criminal facilitation statute).

[122] WORKING PAPERS, *supra* note 96, at 161.

[123] *Id.*

This standard was adopted by federal courts because of their concern with finding sufficient involvement in the criminal scheme to merit an inference of intent.[124] On the other hand, courts utilizing a facilitation standard base liability merely on assistance given with knowledge of an unlawful purpose; therefore no inference of intent is necessary.[125]

Another argument advanced by the drafters of the proposed federal code to justify their selection was that the "substantial assistance" standard was necessary to make the crime of facilitation as broad as accomplice liability.[126] Since, however, the primary function of facilitation is to provide an alternative to accomplice liability, the statute should be structured to best serve that function, regardless of whether it is as broad as accomplice liability. In addition, if facilitation is intended to be a lesser included offense of accomplice liability, surely it need not be as broad.

A critical shortcoming of the "substantial assistance" standard is its failure to ensure that liability is based on personal guilt. Since criminal law in the United States is based upon a system of personal guilt, any deviation from that system must be based upon a relationship between facilitator and principal sufficiently substantial to withstand attack under the due process clause of the fifth amendment.[127] The doctrine of accessorial liability satisfies the concept of personal guilt because the aider and abettor has participated in the crime in one of three substantial ways: aiding, counseling, or procuring with the purpose of helping a scheme to succeed.[128] Aiders and abettors are, therefore, responsible for the acts which they assist the principal in performing.

On the other hand, the facilitator is held responsible for his own act of aiding, with liability being predicated upon the criminal use of the aid by the person aided.[129] Since the facilitator is being punished for his actions and not those of the principal, it is not necessary to search for a relationship between his actions and those of the principal to satisfy concepts of personal guilt. The question is basically one of causation, which in Anglo-American criminal law has been answered by a "cause in fact" test.[130] Under the facilitation statute, the inquiry into the causation issue is not for the purpose of imputing the primary harm to the facilitator, but a triggering mechanism for holding the facilitator liable for his own acts. In other words, until the facilitator's aid is put to an illegal use, he is guilty of no legal wrong, although he might be guilty of a moral wrong. The facilitation concept is derivative in the sense that the facilitator's actions are illegal only if they are used to commit another crime, but he is not liable for the actions of another. It follows that, since it is unnecessary to connect the facilitator's aid to the principal's act in order to establish personal guilt, there is no need to determine whether the aid was substantial if it provided the means and opportunity.

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[124] *See, e.g.*, Direct Sales Co. v. United States, 319 U.S. 703, 711-12 (1943) (sale of illegal substances provides more direct substantial assistance than sale of legal substances when used to infer intent). *See generally* 53 COLUM. L. REV. 228, 239-41 (1953) (discussing use of substantial assistance test to show intent).

[125] *See* N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980) (no requirement of intent).

[126] WORKING PAPERS, *supra* note 96, at 161.

[127] *See* Scales v. United States, 367 U.S. 203, 224-25 (1961) (relationship to criminal activity must satisfy personal guilt concept to merit punishment).

[128] *See* note 2 *supra*.

The second element of the New York facilitation statute provides that the conduct must in fact aid another person in the commission of a crime.[131] Under the original statute, the crime committed had to be a felony.[132] This reflected the view also held by the drafters of the proposed revision of the federal criminal code:

> [L]iability for aiding a misdemeanor should be based on complicity [accomplice liability] or not at all. . . . Moreover, in practice it is likely that facilitators will be charged as accomplices, but the facilitation offense will be available for conviction of the lesser offense in borderline cases. No such need is seen for misdemeanors.[133]

In 1978, the New York facilitation statute was amended to create four degrees of facilitation.[134] One new degree was added to cover conduct which provides the "means and opportunity" for a person under the age of sixteen to commit a crime. Thus, culpability for criminal facilitation is now based upon the status of the principal as well as the seriousness of the offense committed.[135] These changes may reflect a growing concern with the problem of juvenile crime in the state and a concern for sexual abuse of juveniles nationwide. It is reasonable to hold a person who sells a gun to a juvenile to a higher degree of liability than one who sells a gun to an adult, or to punish a hotel manager who provides a room to a child for prostitution while ignoring the manager who does the same for an adult.

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[129] N.Y. Penal Law §§ 115.00-.08 (McKinney Supp. 1980).

[130] G. Williams, Textbook of Criminal Law 328 (1978).

[131] N.Y. Penal Law §§ 115.00-.08 (McKinney Supp. 1980).

[132] *Id.* §§ 115.00-.05 (McKinney 1975) (amended 1978).

[133] Working Papers, *supra* note 96, at 161.

The third and final element, which has been the subject of much litigation, requires that the defendant believe that the person aided intends to commit a crime.[136] A 1972 decision construing this provision held that "[n]o 'intent' by the facilitator to commit the prospective crime is required; the *mens rea* consists of a belief on his part that he is probably 'rendering aid' to the prospective perpetrator."[137] This interpretation indicates that the courts understand that the statute supplements the accomplice statute in order to deal with situations where intent is absent.

The most interesting and instructive case construing the facilitation statute was the 1973 case of *People v. Gordon.*[138] In *Gordon*, the defendant met an undercover police officer at a restaurant where he learned that the officer was interested in buying some marijuana. The defendant gave the officer the name, address, and directions to the home of a person who subsequently sold the officer some marijuana. The defendant's conviction was reversed because it was impossible for the defendant to have had any belief that the seller had a criminal intent, because it was nonexistent at the time of the facilitation itself.[139] This case illustrates several points, not the least of which is that the perpetrator must have formed the intent to commit the crime at the time the aid is rendered. It also seems to indicate that the facilitator must have had some contact with the perpetrator before he can be convicted, and the evidence must indicate that the facilitator's conduct aided the person whose conduct he is charged with facilitating. In this case, he facilitated a purchase, but he was charged with facilitating a sale.[140] The points mentioned above are important because the facilitation statute is not intended to be invoked against acts which are innocent when performed, but which are later used for illegal purposes.

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[134] N.Y. PENAL LAW §§ 115.00-.08 (McKinney Supp. 1980).

[135] The new provision makes misdemeanor facilitation a crime when juveniles commit the underlying crime and the facilitator is over 18 years of age. When the facilitator is over 18, and he provides the opportunity for a person under 16 to commit a felony, he is guilty of a class E felony if he believed it probable that the person under 16 intended to commit a felony; the same conduct will result in the commission of a class B felony and the charge of first degree facilitation when the person under 16 commits a class A felony. *Id.* The conduct included under the original first degree statute, *id.* § 115.00 (McKinney 1975) (amended 1978), is now included in the second degree statute, but the punishment remains the same, *id.* § 115.05 (McKinney Supp. 1980).

[136] *Id.* §§ 115.00-.08 (McKinney Supp. 1980).

[137] People v. Harrison, 71 Misc. 2d 782, 337 N.Y.S.2d 13, 15 (Sup. Ct. 1972) (citation omitted); *accord*, People v. Chester, 71 A.D.2d 792, 418 N.Y.S.2d 962, 966 (1979) (facilitator's belief that he was probably aiding in crime sufficient).

[138] 32 N.Y.2d 62, 295 N.E.2d 777, 343 N.Y.S.2d 103 (1972).

B. Complicity Under the Proposed Federal Code

The National Commission on Reform of Federal Criminal Laws has proposed a modified version of the New York facilitation statute.[141] Accepting this recommendation, the proposed Criminal Code Reform Act of 1979 includes a criminal facilitation provision providing for criminal liability based on the conduct of another person if one knowingly facilitates the commission of the offense by providing assistance that is in fact substantial.[142] While the inclusion of this provision would be an improvement compared with the current state of accomplice law, the use of the substantial assistance standard fails to ensure that liability will be based on personal guilt[143] and also fails to provide a definite standard, leaving the courts with the task of defining substantial assistance on a case by case basis.[144] A better standard would be provided by the phrase "means and opportunity" used in the New York facilitation statute.[145]

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[139] *Id.* at 64-66, 295 N.E.2d at 778-79, 343 N.Y.S.2d at 104-05.

[140] Newton could not be convicted of facilitating the officer's possession because possession was a misdemeanor. *Id.* at 65, 295 N.E.2d at 779, 343 N.Y.S.2d at 105-06. The 1978 amendment to New York's criminal facilitation statute allows a person to be charged with misdemeanor facilitation only if the principal is under 16. N.Y. Penal Law § 115.00(2) (McKinney Supp. 1980).

[141] Final Report of the National Commission on Reform of Federal Criminal Laws § 1002, at 68 (1971).

[142] S. 1722, 96th Cong., 1st Sess. § 401(b) (1979). *See generally* Senate Comm. on the Judiciary, 96th Cong., 2d Sess., Report on Criminal Code Reform Act of 1979, at 75-78 (1980) (discussing reasons for inclusion of facilitation provision).

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[143] *See* notes 127 through 130 and accompanying text *supra.*

[144] *See* note 122 and accompanying text *supra.*

[145] N.Y. PENAL LAW §§ 115.00-.15 (McKinney 1975 & Supp. 1980).

THE DECLINE AND NEAR FALL OF STATUTORY SEXISM IN MISSISSIPPI

*M. Carolyn Ellis**

Until the mid-1960's discrimination on the basis of sex was not viewed as a particular legal or societal issue.[1] With the congressional enactment of both the Equal Pay Act of 1963[2] and Title VII of the Civil Rights Act of 1964,[3] and the United States

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[1] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1873) (affirming Illinois' refusal to admit women into law practice). Mr. Justice Bradley's concurrence epitomized society's thinking about women:

> Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141. *Cf.* State v. Hall, 187 So. 2d 861, 863 (Miss.) (upholding exclusion of women from juries), *appeal dismissed,* 385 U.S. 98 (1966) (per curiam). The Mississippi Supreme Court stated:

> The legislature has the right to exclude women [from the jury] so they may continue their service as mothers, wives, and homemakers, and also to protect them (in some areas, they are still upon a pedestal) from the filth, obscenity, and noxious atmosphere that so often pervades a courtroom during a jury trial.

187 So. 2d at 863.

[2] Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976), an amendment to the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. §§ 201-219 (1976), provides:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . .

[3] The Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1976) provides:

> It shall be an unlawful employment practice for an employer—(1) to fail or

Supreme Court's landmark decision in *Reed v. Reed,*[4] however, national attention began to focus on the problems of gender discrimination. Unfortunately, public concern over sex discrimination in Mississippi has, until recently, been slight. In the late 1970's such discrimination still permeated the state constitution,[5] the Mississippi Code,[6] and case law.[7] However, in the past few years, and particularly during the 1980 and 1981 legislative sessions, Mississippi has moved more quickly toward eradication of sex discriminatory laws. A substantial amount of the impetus has come from the decisions of the United States Supreme Court[8] and, to a lesser extent, from a 1979 decision of the Mis-

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> refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

The 1964 Act was intended to protect blacks and other minorities from employment discrimination. In an attempt to gain allies for the Southern faction, the Act was amended on the day before it was passed to include the word "sex." Although it was generally thought that inclusion of sex discrimination would arouse opposition to the Act from the "liberal" element of Congress, this did not prove to be true. As a result of this last minute amendment, there is virtually no legislative history on sex discrimination and Title VII. *See* L. KANOWITZ, WOMEN AND THE LAW: THE UNFINISHED REVOLUTION 103-06 (1969) (describing the peculiar history of Title VII). *See generally* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964,* 51 MINN. L. REV. 877, 879-85 (1967) (discussion of the legislative history of the Act).

[4] 404 U.S. 71, 74 (1971) (invalidating a state statute as a denial of equal protection to women under the fourteenth amendment). *See* note 11 *infra.*

[5] *E.g.,* MISS. CONST. art. 9, § 214, subjects only men to military duty; MISS. CONST. art. 4, § 106 (1890) (amended 1978), formerly provided that only women were eligible for the position of State Librarian.

[6] *See, e.g.,* MISS. CODE ANN. § 21-29-145 (1972) (amended 1978) (death benefits); *id.* § 71-3-25 (amended 1979) (same); *id.* § 93-1-5 (marriage license requirements); *id.* § 97-3-71 (assault with intent to ravish).

[7] *See* Green v. State, 270 So. 2d 695, 697 (Miss. 1972) (only men liable for voyeurism); State v. Hall, 187 So. 2d 861, 863 (Miss.) (upholding exclusion of women from juries), *appeal dismissed,* 385 U.S. 98 (1966) (per curiam).

[8] *See, e.g.,* Orr v. Orr, 440 U.S. 268, 271 (1979) (invalidated Alabama's alimony statute which granted alimony to wives only); Stanton v. Stanton, 421 U.S. 7, 17 (1975) (invalidating statutory differences in age of majority for males and females with regard to parent's obligation for child support payments); Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (invalidated an Air Force regulation that accorded different treatment

sissippi Supreme Court.[9]

This article concentrates on some of the major discriminatory Mississippi statutes and examines the recent changes made by the legislature, the legal necessity for those changes, and the status of women in Mississippi after the recent flurry of legislative activity. Because of the number of gender-based statutes in Mississippi, the article focuses primarily on the woman in two emergent roles—first, the woman as worker and economic being and, second, the woman as criminal.[10]

Although the standard of review in sex discrimination cases varied during the early 1970's,[11] the United States Supreme Court appears finally to have fashioned a concrete test. This new test lies between the traditional rational relation test[12] and the strict scrutiny test which is usually applied in cases of discrimination based on race, religion, or national origin.[13] The Supreme

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to the sexes solely for administrative convenience).

[9] *See* Tatro v. State, 372 So. 2d 283, 285 (Miss. 1979) (anti-fondling statute, which punished only males, violated equal protection clause). The legislature promptly corrected the inherent constitutional defect in MISS. CODE ANN. § 97-5-23 (1972) (amended 1980). *See also* notes 192 through 206 and accompanying text *infra*.

[10] *See generally* F. ADLER, SISTERS IN CRIME: THE RISE OF THE NEW FEMALE CRIMINAL 15-20 (1975) (percentage of women who commit crimes has increased significantly).

[11] *Compare* Reed v. Reed, 404 U.S. 71, 76 (1971) (Court applied what seemed to be an intermediate level of review to invalidate Idaho's sex discriminatory statute governing issuance of letters of administration) *with* Frontiero v. Richardson, 411 U.S. 677, 682 (1973) (plurality of the Court indicated sex-based distinctions were suspect classification and applied standards reminiscent of the strict scrutiny test) *and* Kahn v. Shevin, 416 U.S. 351, 355-56 (1974) (Court retreated from strict scrutiny test used in *Frontiero* and apparently used rational relation test).

[12] The traditional rational relation test is generally satisfied if the classification itself is a rational one, the classification furthers a proper governmental purpose, and all persons within the class are treated equally. *See, e.g.*, Railway Express Agency v. New York, 336 U.S. 106, 110 (1949) (holding that a New York statute regulating advertising on vehicles was rationally related to its intended purpose); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-79 (1911) (classification having some reasonable basis does not violate equal protection clause). In the sex discrimination area the rational relation test was used consistently prior to the *Reed* decision, always upholding the challenged statute. *See, e.g.*, Goesaert v. Cleary, 335 U.S. 464, 466-67 (1948) (Court applied rational relation test to uphold statute prohibiting most women from bartending).

[13] The strict scrutiny test, which requires that a compelling state interest exist, almost invariably results in invalidation of the disputed statute. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191-93 (1964) (strict scrutiny applied to invalidate Florida statute subjecting only interracial unmarried couples to criminal liability for cohabitation); Hernandez v. Texas, 347 U.S. 475, 477, 482 (1954) (strict scrutiny employed to overturn

Court has not yet labeled this new standard, but it will be referred to in this article as the "substantial relationship" test.[14] This article will examine the Mississippi statutes in light of that test.

I. STATUTORY ECONOMIC DISCRIMINATION

A. *Marriage Restrictions*

Women, like minorities, often encounter discrimination because of cultural biases. The Mississippi statute governing the issuance of marriage licenses[15] illustrates the sex stereotyping that hinders women's opportunities to gain skills necessary for employment. For example, the Mississippi statute provides that a female need only be fifteen years of age to marry without the consent of her parents, whereas a male must be seventeen years of age. Two factors are often cited to justify such a distinction: (1) females mature psychologically and emotionally at an earlier

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murder conviction where Mexican-Americans were systematically excluded from jury service).

[14] Although the Court typically does not label its standards of review, commentators have attempted to denominate the Court's tests when analyzing them. *See* Gunther, *The Supreme Court, 1971 Term—Forward: "In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,"* 86 HARV. L. REV. 1, 21 (1972) (labeling the middle-tier test "rational scrutiny"). The most frequently cited case employing this test is Craig v. Boren, 429 U.S. 190, 197, 199 (1976) (invalidating gender-based distinctions in legal drinking age). In discussing the middle-tier test, the *Craig* Court stated: "To withstand constitutional challenge, previous cases establish that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives." *Id.* at 197. This test also has been employed in cases involving the rights of illegitimates. *See, e.g.,* Trimble v. Gordon, 430 U.S. 762, 766-67, 769 (1977) (statute must bear a substantial relationship to a legitimate state purpose). *But cf.* Fiallo v. Bell, 430 U.S. 787, 799-800 (1977) (Immigration and Nationality Act, excluding the relationship between an illegitimate child and natural father from preference, held constitutional; responsibility of Congress to change discriminatory law).

[15] MISS. CODE ANN. § 93-1-5(d) (1972) states in pertinent part:

> The clerk shall not issue a marriage license under the provisions of this section unless the male applicant is at least seventeen (17) years of age, and the female is at least fifteen (15) years of age, provided, however, that if . . . sufficient reasons exist . . . and that the parents or other person in loco parentis of the person or persons so under age consent thereto, then the judge . . . may waive the minimum age requirement . . . .

Subsection (a) provides that an application for a marriage license must be filed in the female applicant's county of residence if she is a Mississippi resident under the age of 21. There is no similar provision for male applicants under the same age.

age than males, and (2) males need additional time to prepare themselves for a lifetime of work.[16] The latter reason is rooted in the traditional view that men have the obligation to support the family, thus they need additional time to acquire necessary employment skills through either education or training.[17] Men have long been viewed as having two worlds—family and work, whereas women have generally had only one—family.[18]

Although these stereotypes may have a historical basis they are not valid in the 1980's. Today, fifty percent of all women are in the labor force[19] and ninety-one percent have been or will be in the labor force during their lives.[20] Several reasons account for this increase. The rising divorce rate,[21] coupled with the fact that more women remain single longer,[22] has caused an increase in the number of employed women. Furthermore, faced with rising inflation, many married women have joined the labor force in an effort to maintain their families' standard of living.[23]

In the early 1970's, at least one state court determined that a marriage statute similar to that of Mississippi was unconstitutional. In *Berger v. Adornato,*[24] a New York trial court held that gender-based age distinctions with regard to parental consent for marriage violated equal protection principles. The New York legislature subsequently modified the statute to provide that either sex upon reaching age eighteen could marry without parental consent.[25]

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[16] *Cf.* Stanton v. Stanton, 421 U.S. 7, 10, 14 (1974) (Court discussed these distinctions, but rejected them as a basis for statutory differences in ages of majority for males and females with regard to parent's obligation for child support payments).

[17] *See* Stanton v. Stanton, 30 Utah 2d 315, 319, 517 P.2d 1010, 1012 (1979).

[18] *See* E. CAREY & K. PERATIS, WOMAN AND THE LAW 145-76 (1979) (history of sex-based differentials in marriage law).

[19] U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 13 (1979) (statistics for the fourth quarter of 1978); *cf.* U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT 12 (1979) (1978 rate of employment in Mississippi was 47.1% for women over age 16 and 47.8% for women over age 20).

[20] U.S. DEP'T OF STATE, AMERICAN WOMEN TODAY AND TOMORROW 18 (1977) (National Commission on the Observance of International Women's Year, 1975, B. Bryant, author).

[21] *See* U.S. DEP'T OF LABOR, EMPLOYMENT AND TRAINING REPORT OF THE PRESIDENT 100 (1979) (77.6% of the 2.8 million divorced women heading families were employed in 1978).

[22] *See id.* (of the 1.3 million American women never married, 55.8% were employed in 1978).

[23] *See id.* at 99.

[24] 76 Misc. 2d 122, 350 N.Y.S.2d 520, 524 (Sup. Ct. 1973) (statute requiring parental consent for marriage of male under age 21 and female under age 18 was arbitrary and violated equal protection clause).

A few years later the United States Supreme Court, in *Stanton v. Stanton*,[26] addressed the constitutionality of Utah's general emancipation statute,[27] which provided that females reached the age of majority at age eighteen while males attained majority age at twenty-one. In *Stanton*, a divorced father, under court order to provide child support for his son and daughter, ceased child support payments to his daughter when she reached the age of eighteen.[28] In an opinion by Justice Blackmun, the United States Supreme Court held by an eight-to-one vote that the Utah statute violated the equal protection clause of the fourteenth amendment. In so holding, Blackmun eloquently recognized significant societal changes:

> [W]e perceive nothing rational in the distinction drawn by § 15-2-1 which, when related to the divorce decree, results in the appellee's liability for support for Sherri only to age 18 and for Rick to age 21. This imposes "criteria wholly unrelated to the objective of that statute." A child, male or female, is still a child. No longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas . . . . Women's activities and responsibilities are increasing and expanding. Coeducation is a fact, not a rarity. The presence of women in business, in the professions, in government and, indeed, in all walks of life where education is a desirable, if not always a necessary, antecedent is apparent and a proper subject of judicial notice. If a specified age of minority is required for the boy in order to assure him parental support while he attains his education and training, so, too, is it for the girl. To distinguish between the two on educational grounds is to be self-serving: if the female is not to be supported so long as the male, she hardly can be

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[25] N.Y. DOM. REL. LAW § 15(2) (McKinney 1977).

[26] 421 U.S. 7 (1975); *see* note 16 *supra*.

[27] 421 U.S. at 13-17; UTAH CODE ANN. § 15-2-1 (1953) (amended 1975). Conversely, Mississippi's general emancipation statute, MISS. CODE ANN. § 1-3-27 (1972) defines "minor" as "any person, male or female, under twenty-one years of age."

[28] 421 U.S. at 8-9.

> expected to attend school as long as he does, and bringing her education to an end earlier coincides with the role-typing society has long imposed. And if any weight remains in this day to the claim of earlier maturity of the female, with a concomitant inference of absence of need for support beyond 18, we fail to perceive its unquestioned truth or its significance. . . .[29]

Assuming arguendo that the age distinction based on sex could ever have been related to a governmental interest, Justice Blackmun's decision made clear that such a nexus no longer exists. The contested statute in *Stanton* could not withstand challenge under even the lower rational relationship standard.[30] Therefore, it was unnecessary for the Court to determine whether the statute could withstand the higher standard of *Craig v. Boren.*[31]

Under the *Stanton* criteria, it would be difficult, if not impossible, to justify constitutionally the age provisions of the Mississippi marriage license statute. Using even the less stringent standard, a court should conclude that the statute is constitutionally impaired. Inexplicably, a corrective bill introduced during the 1980 legislative session did not get out of its legislative committee.[32] The bill was not reintroduced in the 1981 legislative session.

B. Prohibition Against Enticement into Employment

Only one other Mississippi statute embodied a similar age distinction. The statute prohibited enticing either females under the age of eighteen or males under the age of twenty-one into employment without parental consent.[33] This statute was liter-

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[29] *Id.* at 14-15.

[30] *See* note 12 *supra.*

[31] *See* note 14 *supra.*

[32] S. 2127, 1980 Miss. Leg., Reg. Sess., introduced by Sen. Ellis Bodron, did not pass the Senate Judiciary Committee. It would have amended MISS. CODE ANN. § 93-1-5 (1972) to provide that both males and females had to attain 17 years of age before a marriage license could be issued without parental consent.

[33] MISS. CODE ANN. § 97-5-7 (1972) (amended 1980) prior to the 1980 amendment provided:

> Any person who shall persuade, entice, or decoy away from its father or mother, with whom it resides, any child under the age of twenty-one years if a male, or eighteen if a female, being unmarried, for the purpose of employing

ally a holdover from the child labor laws of the 19th century.[34] The 1980 state legislature rectified the inherent unconstitutionality of the enticement statute by lowering the age of protection for males from twenty-one years to eighteen years of age.[35]

C. *Protective Labor Laws*

1. Historical Background

Despite the cultural bias against women workers manifested in statutes prohibiting the enticement of women into employment and by marriage licensing provisions,[36] women began to enter the labor force in large numbers after the Civil War.[37] Initially, they faced horrendous working conditions and below-subsistence wage levels.[38] These conditions fostered the organization of social reform groups including the National Consumers League, the General Federation of Women's Clubs, and the National Women's Trade Union League.[39] These groups success-

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such child without the consent of its parents, or one of them, shall . . . be . . . fine[d] . . . or imprisoned . . . or both.

[34] The forerunner of MISS. CODE ANN. § 97-5-7 (1972) (amended 1980) was MISS. REV. CODE § 2755 (1880).

[35] Act of April 23, 1980, ch. 357, 1980 Miss. Laws 645 (codified at MISS. CODE ANN. § 97-5-7 (Supp. 1980)).

[36] *See* notes 15 through 35 and accompanying text *supra*.

[37] The employment of women in manufacturing, for instance, increased from 270,897 in 1860 to 323,770 in 1870. By 1900 over 1,029,296 women, 19.4% of the total work force, held manufacturing jobs. U.S. CENSUS OFFICE, DEP'T OF INTERIOR, EIGHTH CENSUS OF THE UNITED STATES 742 (1865); U.S. DEP'T OF INTERIOR, TWELFTH CENSUS OF THE UNITED STATES at cxxvi, table XIII A (1902). One historian has suggested that the depletion of the labor force caused by Civil War casualties forced women into the labor force. E. FLEXNER, CENTURY OF STRUGGLE 134 (rev. ed. 1975).

[38] The National Consumers League protested $2.00 weekly wages; 7:45 a.m. to 12:00 a.m. work schedules; and lack of work seats, lockers, vacations, and lunchrooms. E. FLEXNER, *supra* note 37, at 213 (citing M. NATHAN, THE STORY OF AN EPOCH-MAKING MOVEMENT 1-14 (1926)). For a comprehensive treatment of women's working conditions in turn-of-the century America, see U.S. DEP'T OF COMMERCE AND LABOR, REPORT ON THE CONDITION OF WOMEN AND CHILD WAGE EARNERS IN THE UNITED STATES, S. Doc. No. 645, 61st Cong., 2d Sess. (1912) (19 volumes).

[39] The National Women's Trade Union organized women for membership in existing unions and assisted unions which already had women members. The General Federation of Women's Clubs was a major force behind the government's investigation of labor conditions cited in note 38 *supra*. The National Consumers League urged consumers to pressure employers into improving working conditions. The purposes and efforts of these organizations are described in more detail in B. BABCOCK, A. FREEDMAN, E. NORTON & S.

fully lobbied for the passage of state "protective" labor laws.[40]

The United States Supreme Court addressed the constitutionality of this type of law in *Muller v. Oregon,*[41] a 1908 case. There the Court upheld the constitutionality of an Oregon statute that prohibited employers from employing women for longer than ten hours per day.[42] *Muller* was decided during the heyday of the substantive due process analysis[43]; only three years earlier, in *Lochner v. New York,*[44] the Court had struck down a New York law limiting male and female bakery workers to ten hour work days and sixty hour work weeks.[45] Relying on a brief submitted by Louis Brandeis prior to his appointment to the Court, the Court distinguished *Lochner,* basing its reasoning on the inherent "difference in the sexes."[46] Fueled by *Muller,* states accelerated the passage of protective labor laws. By 1917, thirty-eight states had enacted some type of protective legislation.[47] However, this legislation hampered resolution of many of the employment problems faced by women. Some women's organizations pointed out that since men could be paid less, could work for longer hours, and could be employed at night, employers often preferred men over women employees.[48] In recognition of these facts, these groups advocated the repeal of some protective laws and the extension of others to cover all workers, not just women.[49] The more traditionally minded reform organizations opposed these changes, basing their position on concepts similar

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Ross, Sex Discrimination and the Law 26-28 (1973) [hereinafter cited as B. Babcock].

[40] *Id.* at 247.

[41] 208 U.S. 412 (1908).

[42] *Id.* at 416-17 (describing provisions of the statute).

[43] For a review of Supreme Court cases applying substantive due process analysis to labor laws, see The Constitution of the United States of America 1310-32 (L. Jayson super. ed. 1973).

[44] 198 U.S. 45 (1905).

[45] *Id.* at 63.

[46] The Court reasoned that since "history discloses the fact that woman has always been dependent upon man" then "she is properly placed in a class by herself" for purposes of protective legislation. 208 U.S. at 421-22.

[47] B. Babcock, *supra* note 39, at 247.

[48] U. O'Neill, Every One Was Brave 241-42 (1969).

[49] B. Babcock, *supra* note 39, at 248-49 (citing A. Hill, Protective Labor Legislation for Women: Its Origin and Effect (1970) (unpublished paper, Yale Law School)).

to those endorsed by the Supreme Court in *Muller*.[50] However, the advocates of equality finally found in Title VII of the Civil Rights Act of 1964 the embodiment of their philosophy.[51]

2. Title VII of the Civil Rights Act of 1964

Title VII prohibits employment discrimination on the basis of race, sex, creed, or national origin.[52] Title VII authorizes the Equal Employment Opportunity Commission (EEOC) to promulgate regulations to implement the provisions of the Act.[53] Since Title VII preempts conflicting state laws,[54] many "protective" labor laws that prohibit the employment of women at night or in certain jobs or areas, establish weight-load requirements, and restrict the number of work hours or days are vulnerable to legal attack.[55] Rather than declare all such laws void, the EEOC in some cases has declared that employers may not use these laws as a defense for failing to provide similar protections to its male workers.[56]

The leading case striking down a state "protective law" is *Rosenfeld v. Southern Pacific Co.*[57] Rosenfeld alleged that a male employee was awarded the position of agent-telegrapher despite plaintiff's job seniority.[58] As one of its defenses, Southern Pacific argued that it was unable to give Rosenfeld the position because to do so would violate a California labor law which limited women's work hours and restricted the weight-loads women could carry.[59] California intervened to defend its law.[60] However, the court rejected both parties' arguments and held that Title VII preempted the state law in question.[61] The court reasoned that EEOC regulations implicitly demonstrated that "state labor laws inconsistent with the general objectives of [Title VII] must be disregarded."[62]

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[50] B. Babcock, *supra* note 39, at 250-61 (describing the growth of the disagreement between groups interested in the plight of working women and the impact of World Wars I and II, the Depression, and other events affecting the women's movement and women's labor market status).

[51] Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1976 & Supp. II 1978)). It was amended by the Equal Employment Opportunity Act of 1972, increasing the enforcement powers of the Equal Employment Opportunity Commission. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified at 42 U.S.C. §§ 2000e to 2000e-16 (1976 & Supp. II 1978)).

[52] 42 U.S.C. § 2000e-2 (1976).

[53] *Id.* § 2000e-12(a).

[54] Title VII provides that state laws must be followed unless they "require or permit the doing of an act which would be an unlawful employment practice under this subchapter." *Id.* § 2000e-7.

[55] Federal regulations promulgated to implement Title VII state that laws which "prohibit or limit the employment of females" in certain occupations or to certain hours discriminate against women in violation of the Act because they "do not take into account the capacities, preferences and abilities of individual females." 29 C.F.R. § 1604.2(b)(1) (1979).

[56] *E.g.,* 29 C.F.R. § 1604.2(3)(ii) (1979) (minimum wage laws for women).

[57] 444 F.2d 1219 (9th Cir. 1971).

Title VII's prohibitions soon spawned further litigation. *Rosenfeld* was followed by *Richards v. Griffith Rubber Mills,*[63] a district court case. Using the supremacy clause, the *Richards* court invalidated an order of the Oregon State Wage and Hour Commission which restricted the number of pounds a female employee could lift.[64] A myriad of later cases likewise invalidated the restrictive laws of other jurisdictions.[65]

Many employers reply to a sex discrimination bill of complaint by including in their answer the bona fide occupational qualification [BFOQ] defense.[66] The statute provides:

> [I]t shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . .

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[58] *Id.* at 1220.

[59] *Id.* at 1223.

[60] *Id.* at 1220.

[61] *Id.* at 1227.

[62] *Id.* at 1226. The court noted that the Supreme Court had declared that "the administrative interpretation of the Act by the enforcing agency 'is entitled to great deference [*sic*].'" *Id.* (quoting Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971)).

[63] 300 F. Supp. 338 (D. Or. 1969).

[64] *Id.* at 340.

[65] *E.g.*, Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096 (S.D. Ohio 1971) (invalidation of Ohio's hours and weight restriction statutes), *rev'd on other grounds,* 474 F.2d 949 (6th Cir. 1972); Garneau v. Raytheon Co., 323 F. Supp. 391, 394-95 (D. Mass. 1971) (invalidation of Massachusetts' maximum hours statute); Local 246, Util. Workers Union v. Southern Cal. Edison Co., 320 F. Supp. 1262, 1267 (C.D. Cal. 1970) (invalidation of California's weight restriction statute); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1307-08 (S.D. Ill. 1970) (invalidation of Illinois' hours and weight restriction laws).

[66] *See, e.g.*, Rosenfeld v. Southern Pac. Co., 444 F.2d 1219, 1223 (9th Cir. 1971) (defendant railroad company defended in part on BFOQ exception). *See generally* notes 57 through 62 and accompanying text *supra.*

> religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[67]

As demonstrated by the EEOC guidelines, the BFOQ exception should be narrowly construed in cases involving sex discrimination.[68]

Weeks v. Southern Bell Telephone & Telegraph Co.[69] is the leading case concerning statutory restrictions on women employees under a BFOQ rationale. The defendant telephone company in *Weeks* complied with a Georgia state regulation which limited the weight-load of a woman employee to thirty pounds.[70] The Fifth Circuit Court of Appeals concluded that Congress intended the BFOQ defense to be construed narrowly. Therefore, the court held that the telephone company failed to meet the heavy burden of proof which confronts an employer who relies on a state's restrictive law as a BFOQ defense.[71]

Other cases have focused specifically on statutes which limit the employment roles of women. In *Jordan v. Wright*,[72] the court held that wholesale exclusion of women from the work of "police patrolmen" was not based on a BFOQ.[73] The Montgomery, Alabama police department maintained one job classification termed "police-woman," which encompassed duties "best performed by a woman . . . ."[74] When the female plaintiffs sought positions as general "police patrolmen," their applications were denied. At least one applicant was told that such police work was "too dangerous for women and that . . . Montgomery was not yet ready for women on patrol."[75] Evidence established that the defendant police department did not evaluate the women's individual qualifications for general police work.[76] The court held for the plaintiffs, stating that "the defendants have not seriously attempted to demonstrate that sex is a 'bona fide occupational qualification' for the job responsibilities included in the classification of police patrolman. . . . Defendants . . . introduced no evidence . . . that women are unable to perform safely and efficiently the duties of an officer engaged in general police work, including patrol."[77]

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[67] 42 U.S.C. § 2000e-2(e)(1) (1976). An employer may restrict employment opportunities, for instance, in hiring actors or religion teachers. *Id.* § 2000e-2(e)(2); 29 C.F.R. § 1604.2(a)(2) (1979). Note that the BFOQ is not a defense to racial discrimination.

[68] 29 C.F.R. § 1604.2(a) (1979). The regulations provide further that state laws which prohibit or limit the employment of females, for example, in certain occupations or during certain hours, "will not be considered a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." *Id.* § 1604.2(b)(1).

[69] 408 F.2d 228 (5th Cir. 1969).

[70] *Id.* at 232-33.

[71] *Id.* at 232.

[72] 417 F. Supp. 42 (M.D. Ala. 1976) (mem.).

[73] *Id.* at 45.

[74] *Id.* at 44 (citing City of Montgomery Police Department Manual of Rules and Regulations § 136, "General Duties of Policewomen").

Similarly, in *United States v. City of Chicago,*[78] the Court of Appeals for the Seventh Circuit upheld a sex discrimination claim against the Chicago police department.[79] Evidence established that women in the department were usually assigned limited duties relating either to the processing and custody of female prisoners or to juvenile offenders.[80] The court held that such practices "could be justified only by proof that sex is a bona fide occupational qualification of those positions from which women have been excluded."[81] The court, commenting that the city of Chicago had not attempted to prove that women could not perform full police duties,[82] remanded the case to the district court on the equal protection issues raised by the plaintiffs.[83]

Since Title VII is applicable only to employers with a minimum of fifteen employees,[84] many states have enlarged the protected class by passing either state anti-discrimination laws or amendments to their state fair employment acts to cover those employers not within the purview of Title VII.[85] By prohibiting sex discrimination in the employment field, the statutes either repealed or invalidated existing protective legislation in those jurisdictions.[86] Mississippi, however, remains one of ten states that does not per se prohibit sex discrimination in employment.[87]

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[75] 417 F. Supp. at 44.

[76] *Id.* at 44-45.

[77] *Id.* at 45.

[78] 549 F.2d 415 (7th Cir.), *cert. denied,* 434 U.S. 875 (1977).

[79] 549 F.2d at 435.

[80] *Id.* at 434.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 435.

[84] 42 U.S.C. § 2000e(b) (1976).

[85] *See, e.g.,* DEL. CODE ANN. tit. 19, §§ 710-718 (rev. 1974); IOWA CODE ANN. § 601A.6

3. Mississippi's Protective Laws

As late as 1980 Mississippi had two types of restrictive statutes in effect. One statute[88] limited the maximum hours and days which a woman could work. Another group of statutes[89] limited the employment possibilities of a woman in the Mississippi Highway Patrol. In 1981, both of these statutes became obsolete, one by repeal and the other by amendment.

a. Maximum Hours Statute

Mississippi's maximum hours statute[90] restricted women

(West 1974); MINN. STAT. ANN. §§ 363.01-.03 (West Supp. 1979); MONT. REV. CODES ANN. §§ 49-2-101 to -303 (1979); R.I. GEN. LAWS §§ 28-5-1 to -39 (1979 reenactment & Supp. 1980); WASH. REV. CODE ANN. §§ 49.60.010-.320 (Supp. 1979); WYO. STAT. §§ 27-9-101 to -109 (1977), *cited in* Kennedy, *Sex Discrimination: State Protective Laws Since Title VII,* 47 NOTRE DAME LAW. 514, 525 n.102 (1972) (citing earlier versions of state codes).

[86] Some jurisdictions have determined that state anti-discrimination laws supersede protective laws. *See, e.g.,* Jarosak v. City of Minneapolis, [1969-1970 Transfer Binder] LAB. L. REP. (CCH) ¶ 9457, at 6845 (Minn. Dist. Ct. Nov. 18, 1969) (city ordinance prohibiting women from serving liquor at any public bar unless they are licensees or wives of licensees conflicts with state anti-discrimination and fair employment statutes); City of Milwaukee v. Wisconsin Dep't of Indus., Labor & Human Relations, 3 Empl. Prac. Dec. ¶ 8125, at 3694 (Wis. Cir. Ct. Feb. 24, 1971) (municipal ordinance banning bartending licenses to women invalidated by subsequent state statute); Longacre v. State, 448 P.2d 832, 834 (Wyo. 1968) (Fair Employment Act superseded Wyoming's statute prohibiting women from bartending).

[87] *See* 4 LAB. REL. REP. (BNA), State Labor Law 1:12, 1:13 (Nov. 7, 1977). Nine of these ten states are southern states: Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, North Dakota, Tennessee, Texas and Virginia.

[88] MISS. CODE ANN. § 71-1-33 (1972) (repealed 1981), originally promulgated in 1914 after Muller v. Oregon, 208 U.S. 412 (1908), provided:

> It shall be unlawful for any person, firm, or corporation to work any female in any laundry, millinery, dressmaking store, office, mercantile establishment, theater, telegraph or telephone office, or any other occupation not here enumerated more than ten hours per day or more than sixty hours per week, except in case of emergency or where public necessity requires it. This section shall not apply to domestic servants.

[89] MISS. CODE ANN. §§ 45-3-7 to -49 (1972) (amended 1981).

[90] *Id.* § 71-1-33 (repealed 1981).

other than domestic servants to a ten hour work day and a sixty hour work week. Obviously, the statute's prohibition was meaningless in many instances, for example, in the employment of professional women such as certified public accountants or in the employment of women farm workers. In non-professional employment, where the largest percentage of women are employed,[91] the statute served only to exclude or limit women from lucrative overtime compensation.

In the face of the *Rosenfeld* line of cases,[92] the Mississippi maximum hours statute was clearly vulnerable to a Title VII attack in some situations, and a BFOQ defense for the state would have been futile. However, as a result of the limitations of Title VII,[93] many Mississippi employers with small businesses were still able to rely on the maximum hours statute with impunity. The legislature could have taken one of two steps to cure the discriminatory aspects of the statute—repeal of the statute or extension of the statutory benefits.[94] Repeal of the statute presented the potential danger that small business employers not covered by Title VII could compel both men and women to work abnormally long work days.[95] Extension of the maximum hours laws to both sexes would, according to some commentators, "drastically change many work situations,"[96] and many courts have chosen to invalidate such laws rather than to extend them.[97] Despite this trend, it is equally logical to extend statutory benefits to both sexes. Apparently believing that an amendment to the statute would lead to federal litigation and possible invalidation of the statute under the supremacy clause,[98] the Mississippi Legislature voted to repeal it in 1981.[99]

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[91] In 1978, 12.7% of Mississippi's employed women were professional or technical workers; 5.5% were managers or administrators; 5.7% were sales workers; 26.7% were clerical workers; 2.0% were craft workers; 22.2% were operatives (non-transportation); 1.0% were nonfarm laborers; 21.8% were service workers; and 1.4% were farm workers. U.S. DEP'T OF LABOR, GEOGRAPHIC PROFILE OF EMPLOYMENT AND UNEMPLOYMENT: STATES 27 (1978) (detailing women's employment roles).

[92] *See* notes 57 through 65 and accompanying text *supra.*

[93] 42 U.S.C. 2000e(b) (1976) (Title VII applicable only to employers with 15 or more employees).

[94] The EEOC guidelines suggest that certain discriminatory employment laws, such as statutes dealing with minimum wages, lunch and rest periods, overtime compensation, and rest days, can be cured by extending the benefits to both sexes. *See* 29 C.F.R. §§ 1604.2(b)(3)-(4) (1979).

Commonly, employers hire men instead of women to avoid expending additional money for the benefits required by law. The EEOC, cognizant of this, determined that benefit-conferring statutes would comply with Title VII if benefits were extended to men. Although the maximum hours type of statute was viewed by the EEOC as a limiting provision rather than a benefit-conferring provision, a maximum hours statute might be salvaged by making its provisions applicable to both sexes. *See id.* § 1604.2(b)(1); *cf.* Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1084 (9th Cir. 1972) (sex-based overtime statute conflicted with Title VII, but could be saved by equal application to both men and women workers).

Notwithstanding *Hays,* courts generally have viewed extensions of benefits as a legislative function. *See, e.g.,* Homemakers, Inc. v. Division of Indus. Welfare, 509 F.2d 20, 23 (9th Cir. 1974) (upholding lower court ruling that only legislature has power to regulate maximum overtime pay for female employees), *cert. denied,* 423 U.S. 1063 (1976).

b. *Mississippi Highway Patrol Restrictions*

Prior to their amendment in 1981, the Mississippi statutes governing hiring by the Mississippi Highway Patrol exemplified a type of "protective" legislation that actually limits women's employment opportunities.[100] The EEOC guidelines for Title VII determine whether such provisions can withstand a sex discrimination claim. The guidelines explicitly provide that state statutes limiting or prohibiting the employment of women in certain occupations are superseded by the EEOC regulations.[101] Under Title VII, an employer may not stereotype an entire class, such as women, but must look to the capabilities of each individual.[102]

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[95] Presumably, only nonunion workers would be susceptible to such a threat, since union workers usually have their work hours and conditions prescribed in a collective bargaining agreement. *See* M. FORKOSCH, A TREATISE ON LABOR LAW § 557, at 859 (2d ed. 1965).

[96] *See* Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 936 (1971) (discussing laws restricting conditions of employment and maximum hours of employment).

[97] *See, e.g.,* Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1099 (S.D. Ohio 1971) (state laws restricting employment of females, including statute regulating working hours, declared invalid), *rev'd on other grounds,* 474 F.2d 949 (1972); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 469 (W.D. Pa. 1971) (statutory regulation of working hours of female employees repealed by implication), *aff'd,* 480 F.2d 240 (3d Cir. 1973); Garneau v. Raytheon Co., 323 F. Supp. 391, 394 (D. Mass. 1971) (state law regulating working hours for women declared invalid because of conflict with federal law); Caterpillar Tractor Co. v. Grabiec, 317 F. Supp. 1304, 1308 (S.D. Ill. 1970) (same).

[98] *See* Ridinger v. General Motors Corp., 325 F. Supp. 1089, 1096-97 (S.D. Ohio 1971) (state protective laws conflict with Title VII of the Civil Rights Act; state law void by virtue of supremacy clause), *rev'd on other grounds,* 474 F.2d 949 (1972); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467, 474 (W.D. Pa. 1971) (same), *aff'd,* 480 F.2d 240 (3d. Cir. 1973).

[99] Act of March 2, 1981, ch. 310, 1981 Miss. Laws ___ (repealing MISS. CODE ANN. § 71-1-33 (1972)).

[100] Prior to amendment MISS. CODE ANN. § 45-3-7 (1972) (amended 1981) provided in part: "The commissioner is hereby authorized to employ not exceeding four hundred seventy-five (475) *men* as a Mississippi Highway Safety Patrol . . . ." (emphasis added). The entire code section regarding the highway patrol was manifestly phrased as male,

If the Mississippi Highway Patrol statutes[103] had been judicially challenged they would have been susceptible to invalidation. The primary flaw in the statutes was the blanket prohibition against female patrol officers; the statute did not allow individual evaluation of each woman applicant. However, the legal defects in the highway patrol provisions could not have been corrected merely by changing "men" to "persons," or "patrolman" to "patrol officer." The height-weight requirement in the code was also inherently discriminatory. By mandating a minimum height of five feet, nine inches and a minimum weight of 165 pounds for highway patrol officers, the legislature had implicitly and effectively barred women from these jobs. While this statutory requirement appeared sex neutral, enforcement of the requirement had a disparate impact on women as a class.[104] The decision of the United States Supreme Court in *Griggs v. Duke Power Co.*[105] prohibits such a disparate impact by a facially neu-

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negating application of MISS. CODE ANN § 1-3-17 (1972) which provides: "Words in the masculine gender shall embrace a female as well as a male, unless a contrary intention shall be manifest."

Additionally, MISS. CODE ANN. § 45-3-47(b) (1972) (amended 1981) imposed height and weight requirements for patrolmen which adversely affected women. It provided: "The commissioner shall . . . require a physical examination . . . to determine that each applicant selected is in good physical condition, including height of at least 5'9", weight not less than 165 pounds, with no deformities."

[101] 29 C.F.R. § 1604.2(b)(1) (1979).

[102] *Id.* This provision states: "The Commission [EEOC] has found that such [restrictive] laws and regulations do not take into account the capacities, preferences, and abilities of individual females and, therefore, discriminate on the basis of sex." *Cf.* Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 718 (7th Cir. 1969) (individual evaluation necessary for compliance with EEOC guidelines).

[103] MISS. CODE ANN. §§ 45-3-7 to -49 (1972) (amended 1981).

[104] Prior to 1980, there were no women patrol officers in Mississippi. There are currently three female officers. Telephone conversation between Andy Alexander, Assistant Editor of the *Mississippi Law Journal*, and Paul Wells, Attorney, Legal Office, Mississippi Highway Patrol, Public Safety Commission (June 10, 1981).

[105] 401 U.S. 424, 429-31 (1971).

tral statute.

The court in *Meadows v. Ford Motor Co.*[106] applied the *Griggs* disparate impact principle to height-weight requirements. In *Meadows,* the Ford Motor Company required a minimum weight of 150 pounds for production line employees. Testimony established that although eighty per cent of females from eighteen to twenty-four years of age could not meet the weight requirement, seventy-nine per cent of men between the same ages qualified.[107] Furthermore, Ford was unable to establish a statistically sound nexus between the measure of strength and the minimum weight requirement.[108] Therefore, the court held that Ford had failed to prove a BFOQ defense. The disparate impact against women constituted sex discrimination proscribed by Title VII.[109]

The issue of height-weight requirements came before the United States Supreme Court in 1977 in *Dothard v. Rawlinson.*[110] Dianne Rawlinson sought employment as a prison guard in an Alabama maximum security prison. Although she satisfied the prison system's minimum height requirement of five feet, two inches, she did not meet the minimum weight requirement of 120 pounds.[111] The Court held for the Alabama Board of Corrections on other grounds,[112] but it affirmed the district court's ruling that the statutory weight and height requirements violated Title VII.[113] In determining that Rawlinson had established a prima facie case of illegal sex discrimination on that issue, the Court employed the *Griggs* disparate impact standard: "When the height and weight restrictions are combined, Alabama's statutory standards would exclude 41.13% of the female population while excluding less than 1% of the male population."[114]

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[106] 62 F.R.D. 98 (W.D. Ky. 1973), *modified,* 510 F.2d 939 (6th Cir. 1975), *cert. denied,* 425 U.S. 998 (1976).

[107] 62 F.R.D. at 99.

[108] *Id.*

[109] *Id.* at 100.

[110] 433 U.S. 321 (1977).

[111] *Id.* at 323-24.

[112] *Id.* at 334. The Court upheld a regulation excluding all women from security guard positions in male maximum security prisons as a BFOQ.

[113] *Id.* at 332.

Although the 1980 Mississippi Legislature rejected bills which would have amended the height-weight requirements and eliminated the sex bias in the highway patrol statutes, the 1981 legislative session saw the passage of a bill which accomplished the same objectives, thus remedying the legal defects in the highway patrol statutes.[115]

D. Loss of Consortium

Although at common law a husband could sue a third party for a tortious injury to his wife which resulted in a loss of consortium to him, the wife was not recognized as having any legal rights to her husband's consortium.[116] Loss of consortium was defined by the courts as the husband's loss of the companionship, society, services, sexual relations, comfort, and support of his spouse.[117] However, early twentieth century courts, perhaps motivated by progressive torts commentators, began to grant the wife the right to recover for loss of consortium in cases in which her husband was the victim of an intentional tort.[118]

Although legislation was not necessary to expand the common law, the Mississippi court, like some other state courts, waited for the legislature to enact a law giving a wife the right to sue.[119] The promulgation of that law came in 1968 as an amendment to the present Married Women's Property Act.[120] Despite the 1968 amendment, the right of married women to sue for loss of consortium has remained less than the full common law right of married men. The amendment referred only to "negligent" injury.[121] Injury resulting from intentional torts is implicitly excluded.[122] Ironically, when courts first began allowing wives' actions for loss of consortium, they did so in instances where husbands were victims of intentional torts.[123]

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[114] *Id.* at 329-30.

[115] S. 2437, enacted as ch. 511, 1981 Miss. Laws ___, changes the language of Miss. Code Ann. §§ 45-3-7 to -49 (1972) from male-oriented to gender-neutral. In addition, the objectionable height-weight provisions were amended to require the applicant to conform to a height-weight ratio recommended by the United States Air Force.

[116] W. Prosser, Handbook of the Law of Torts § 125, at 894 (4th ed. 1971).

[117] *Id.*

[118] *Id.*

[119] *See, e.g.*, Nash v. Mobile & O.R.R., 149 Miss. 823, 835, 116 So. 100, 103 (1928) (court will not allow wife to recover for loss of consortium until legislature acts).

[120] Act of May 27, 1968, ch. 304, § 1, 1968 Miss. Laws 416 (codified at Miss. Code Ann. § 93-3-1 (1972)). The amendment added the sentence "[a] married woman shall have a cause of action for loss of consortium through negligent injury of her husband" to the existing Married Women's Property Act.

Regardless of the limitation in the statute, the courts could remedy the inequity without corrective legislation. While a court should not rectify sexual inequality in a criminal statute by enlarging the class susceptible to criminal penalties,[124] it may either expand the common law or extend an underinclusive noncriminal statute.[125] An extension of the 1968 amendment[126] would provide equal rights of consortium to wives. Such a judicial remedy would be appropriate to a civil claim of sex discrimination under the fourteenth amendment in the absence of legislative action. Furthermore, it would be in accordance with decisions of both state courts[127] and federal courts,[128] as well as with the position of the *Restatement (Second) of Torts*.[129]

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[121] MISS. CODE ANN. § 93-3-1 (1972).

[122] The Mississippi Supreme Court has not addressed the issue whether the amended MISS. CODE ANN. § 93-3-1 (1972) grants a cause of action for intentional injury. The only case reported subsequent to the amendment, Tribble v. Gregory, 288 So. 2d 13 (Miss. 1974), involved negligence.

[123] *See, e.g.*, Pratt v. Daly, 55 Ariz. 535, 104 P.2d 147, 150-51 (1940) (wife's recovery for loss of consortium upheld against one who knowingly sold intoxicating liquor to her husband); Flandermeyer v. Cooper, 85 Ohio St. 327, 98 N.E. 102, 106-07 (1912) (wife recovered for loss of consortium against one who intentionally sold morphine to her husband resulting in his confinement in an insane asylum); Swanson v. Ball, 67 S.D. 161, 290 N.W. 482, 483 (1940) (wife recovered for loss of consortium when husband's death resulted from defendant's willful and malicious sale of intoxicating liquor to him over protest, warnings and written notice); Moberg v. Scott, 38 S.D. 422, 161 N.W. 998, 1001 (1917) (wife recovered for loss of consortium from one who knowingly sold opium to her husband). *See generally* W. PROSSER, *supra* note 116, § 125, at 895 & n.8.

[124] *See* notes 203, 204 and accompanying text *infra*.

[125] *See* Comment, *Extension Versus Invalidation of Underinclusive Statutes: A Remedial Alternative*, 12 COLUM. J.L. & SOC. PROB. 116 *passim* (1975) (tracing the historical and modern trends in judicial extension of statutes); *cf.* note 94 *supra* (compliance with EEOC guidelines through extension of coverage to males).

[126] *See* note 120 *supra*.

[127] *See* note 123 *supra*.

[128] *See, e.g.*, Hubschman v. Antilles Airboats, Inc., 440 F. Supp. 828, 858 (D.V.I. 1976) (wife's claim for loss of consortium upheld under general maritime law); Benjamin v. Cleburne Truck & Body Sales, Inc., 424 F. Supp. 1294, 1296-98 (D.V.I. 1976) (wife granted cause of action for loss of consortium on basis of equal protection clause).

[129] *See* RESTATEMENT (SECOND) OF TORTS § 693, Comment b at 495-96 (1977). In an

E. Employees' Benefits

1. United States Supreme Court Decisions

Economic discrimination against women and society's concomitant undervaluation of traditional women's work can also result in discrimination against men. Several major United States Supreme Court cases have dealt with regulations which automatically provide benefits to women, while either denying such benefits to men or requiring that the male prove his dependence on his wife. The first significant case was *Frontiero v. Richardson.*[130] In that case the Air Force denied Lieutenant Sharon Frontiero's application for quarters allowances and medical and dental benefits for her civilian husband.[131] Under the federal statutes, Sharon Frontiero's husband could obtain these benefits only upon proof that he was "dependent" on her for more than one half of his support.[132] However, the benefits denied to Lieutenant Frontiero's husband were available to wives of servicemen as an automatic right.[133] Frontiero, alleging a fifth amendment due process violation,[134] prevailed before the United States Supreme Court.[135] Using what appeared to be the strict scrutiny standard of judicial review[136] the Court declared the statute unconstitutional.[137] The Court determined that only administrative convenience was served by the statutory distinction

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action by one spouse for harm caused by tortious conduct against the other spouse, "[t]he word 'tortious' . . . includes conduct intended to cause harm, conduct that is negligent and conduct that is carried on at the risk of the actor." *Id.* at 495.

[130] 411 U.S. 677 (1973).

[131] *Id.* at 680.

[132] *Id.* at 678.

[133] *Id.* at 680.

[134] Since Frontiero alleged discrimination by the federal government, her claim was based on the fifth amendment rather than the fourteenth amendment. *Id.* at 680 n.5.

[135] *Id.* at 690-91.

[136] *Id.* at 682-83 (citing Reed v. Reed, 404 U.S. 71 (1971), in which an Idaho statute giving preference to male relatives as administrators of estates was held to violate the equal protection clause of the fourteenth amendment). The *Reed* Court employed a judicial standard which is often referred to as the "strict reasonableness" test and which is less stringent than the strict scrutiny test. *See* notes 11 through 14 *supra*.

In *Frontiero,* a plurality of the Court seemingly considered sex a suspect classification requiring strict scrutiny, but in Craig v. Boren, 429 U.S. 190 (1976), the Court settled on the middle tier of review. *Id.* at 197-98.

[137] 411 U.S. at 691.

between men and women and concluded that "any statutory scheme which draws a sharp line between the sexes, *solely* for the purpose of achieving administrative convenience, necessarily commands 'dissimilar treatment for men and women who are . . . similarly situated' and therefore involves the 'very kind of arbitrary legislative choice forbidden by the [Constitution] . . . .' "[138]

Another case, *Kahn v. Shevin*,[139] concerned a Florida property tax exemption statute which granted an annual property tax exemption of $500 solely to widows. Kahn, a widower, alleged that the statute, by limiting the benefits to women, violated his equal protection rights.[140] Justice Douglas, writing for six members of the Court, held that the sex classification was valid because there was a "fair and substantial relation to the object of the legislation."[141] Douglas, concluding that the statute was designed to alleviate the past and present effects of discrimination against women in the labor market, stated: "While the widower can usually continue in the occupation which preceded his spouse's death, in many cases the widow will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer."[142]

Had *Kahn* been the final word from the Court on the constitutionality of sex-discriminatory statutes, such statutes might remain valid. However, three subsequent decisions by the Supreme Court concerning Social Security benefits indicate that such statutes are unconstitutional, unless certain requirements are met.[143]

In the landmark decision, *Weinberger v. Wisenfeld*,[144] Mrs. Wisenfeld's earnings were the principal source of the family's income. Following her death, her husband applied for survivor's benefits for himself and dependent's benefits for his infant child from the Social Security office. Although his son was granted dependent's benefits, Wisenfeld's application for survivor's benefits for himself was denied, even though his wife had paid Social Security taxes for the requisite number of years. Indisputably, women qualified more easily than men for survivor's benefits under the Social Security law.[145]

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[138] *Id.* at 690.

[139] 416 U.S. 351 (1974).

[140] *Id.* at 352.

[141] *Id.* at 355-56 (quoting Reed v. Reed, 404 U.S. at 76).

[142] 416 U.S. at 354.

[143] Califano v. Webster, 430 U.S. 313 (1977); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wisenfeld, 420 U.S. 636 (1975).

[144] 420 U.S. 636 (1975).

The Court unanimously held that the sex distinction in the Social Security statute was "indistinguishable"[146] from the statute invalidated in *Frontiero*.[147] The Court determined that the Social Security statute did not share the remedial purpose underlying the Florida statute in *Kahn v. Shevin*.[148] Rather, in *Wisenfeld* the Court found that the legislative intent was to provide the children of a deceased parent the opportunity of full-time care by the surviving parent.[149] Since the statute presupposed that only surviving mothers would provide this care, the sex distinction was deemed irrational and unconstitutional.[150] Significantly, the Court found two unconstitutional factors in the statute: (1) the sex-based distinction based upon stereotypical and antiquated assumptions of female dependency,[151] and (2) the violation of women wage earners' equal protection rights to provide for their families in the same manner as male wage earners.[152]

In *Califano v. Goldfarb*,[153] the Court focused on the discrepancy between old-age widows' and widowers' survivor's benefits under the Federal Old-Age, Survivors, and Disability Insurance Benefits Program (OASDI).[154] Under the OASDI Program, qualifying widows received survivor's benefits at a certain age based on their deceased husbands' earnings. Widowers at the same age were not eligible for similar survivor's benefits unless they additionally proved that they had been receiving at least one half of their support from their deceased wives.[155] The Court held this requirement of proof violated the fifth amendment due process clause.[156] The statute was based on the "archaic and overbroad"[157] assumption that only wives are dependent on their spouses. The Court held that this underlying assumption was not rational and did not justify a gender-based distinction in the distribution of survivor's benefits.[158]

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[145] *Id.* at 639. Under 42 U.S.C. § 402(g) (1970 & Supp. III 1973) (amended 1977), a widow was entitled to mother's insurance benefits if she had a minor child. If the widow was working, those benefits were reduced one dollar for every two dollars earned over $2,400. *Id.* §§ 403(b),(f) (amended 1977). 420 U.S. at 640-41.

[146] 420 U.S. at 642, 653.

[147] *Id.* at 642-43.

[148] *Id.* at 648.

[149] *Id.* at 648-51.

[150] *Id.* at 651-53.

[151] *Id.* at 651-52.

[152] *Id.* at 645.

[153] 430 U.S. 199 (1977).

[154] *Id.* at 201-02. *See* 42 U.S.C. §§ 402(e)(1), (f)(1) (1970 & Supp. V 1975) (amended 1977).

The final case in the Social Security trilogy is *Califano v. Webster*,[159] which was decided in a per curiam opinion on the same day as *Goldfarb*. The Social Security statute at issue in *Webster* used different procedures to compute male and female wage-earners' old-age insurance benefits.[160] The result of this distinction was a higher level of monthly old-age insurance benefits for retired women workers than for their male counterparts.[161] The government defended the distinction on the *Kahn* theory of a remedial compensatory purpose. The Court, accepting the government's argument, stated that the "challenged statute operated directly to compensate women for past economic discrimination"[162] which traditionally placed and kept women in lower-paying jobs than those of men.[163] Since the legislative history of the statute specifically demonstrated that the law was drafted for this purpose, the Court upheld the statute.[164]

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[155] 42 U.S.C. § 402(f)(1) (1970 & Supp. V 1975) (amended 1977).

[156] 430 U.S. at 202.

[157] *Id.* at 207 (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)).

[158] 430 U.S. at 214-17.

[159] 430 U.S. 313 (1977).

[160] *Id.* at 314-16. *See* 42 U.S.C. § 415 (1970 & Supp. V 1975) (amended 1972).

[161] 430 U.S. at 314-16. This Social Security provision was amended in 1972 to equalize treatment of retired male and female workers. However, it did not apply to males who reached age 62 before 1972. Social Security Amendments of 1972, Pub. L. No. 92-603, § 104(b), 86 Stat. 1340 (amending 42 U.S.C. § 415(b) (1970)).

[162] 430 U.S. at 318.

[163] *Id.*

[164] *Id.*

Goldfarb and *Wisenfeld* have since developed their own progeny. In at least three subsequent cases the United States Supreme Court has invalidated Social Security statutes containing sex-based classifications in benefits for aged spouses.[165]

Analysis of this entire line of cases, especially the *Wisenfeld-Goldfarb-Webster* trilogy, discloses that statutes which create or sanction economic disparities between men and women are unconstitutional if they are based on traditional sexual stereotypical notions such as female dependency. However, if the purpose of the statutory classification is remedial and if the government can show a strong correlation between the classification and the remedial purpose, then the statute may withstand a constitutional challenge.[166]

2. Mississippi Death Benefits Statutes

a. *Worker's Compensation Statute*

The Mississippi Code provides a death benefit for the widow of a man killed at his place of employment and covered by worker's compensation.[167] Under this statute a surviving wife can always collect the benefit. However, a surviving husband cannot ordinarily recover any such lump-sum benefit upon the death of his wife. An exception to this prohibition occurs only if the husband proves financial dependence on the wife. The statute explicitly presumes that a wife is always dependent on her husband,[168] while impliedly presuming that a husband is rarely dependent on his wife. Application of the *Goldfarb* line of cases to this statute[169] indicates its constitutional defects. When other state supreme courts have considered similar statutes, they have invalidated them on fourteenth amendment grounds. The most notable case from a state court is *Arp v. Workers' Compensation Appeals Board.*[170]

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[165] *See* Abbott v. Weinberger, Civ. No. C-74-194 (N.D. Ohio Feb. 11, 1976) (gender based classification of Social Security Act's old age and disability insurance benefits held unconstitutional), *aff'd mem. sub nom.* Califano v. Abbott, 430 U.S. 924 (1977); Jablon v. Secretary of HEW, 399 F. Supp. 118 (1975) (same), *aff'd mem.*, 430 U.S. 924 (1977); Sibowitz v. Secretary of HEW, 397 F. Supp. 862 (1975) (same), *aff'd mem.*, 430 U.S. 924 (1977).

[166] B. Babcock, *supra* note 39, at 62 (W. Williams, Supp. 1978).

[167] Miss. Code Ann. § 71-3-25(a), (c), (g) (Supp. 1979) provides:

> If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:
>
> (a) An immediate lump sum payment of two hundred fifty dollars ($250.00) to the widow, in addition to other compensation benefits.
>
> . . .
>
> (c) If there be a surviving wife or dependent husband and no child of the deceased, to such wife or dependent husband thirty-five percent (35%) of the average wages of the deceased during widowhood or dependent widowhood and, if there be a surviving child or children of the deceased, the additional amount of ten percent (10%) of such wages for each such child.
>
> . . .
>
> (g) . . . A surviving wife, child or children shall be presumed to be wholly dependent. All other dependents shall be considered on the basis of total or partial dependence as the facts may warrant.

In 1977, the United States Supreme Court affirmed a decision similar to *Arp* in *Railroad Retirement Board v. Kalina,*[171] which involved a fifth amendment challenge to the constitutionality of the retirement annuities provision of the federal Railroad Retirement Act.[172] The Court, in a memorandum opinion, upheld the determination of the Sixth Circuit Court of Appeals that there was an equal protection violation. The court of appeals had employed the *Arp* rationale in reaching its conclusion.[173]

Finally, in 1980, the United States Supreme Court had the opportunity to address the precise issue faced by the *Arp* court.[174] In *Wengler v. Druggists Mutual Insurance Co.*, the Court examined the Missouri worker's compensation death benefit statute.[175] The Missouri statute provided that a deceased worker's widow was automatically entitled to the death benefit. If the deceased worker was a married woman, her widower was entitled to the death benefit only if he could prove he had been either actually dependent on his wife, or that he was physically or mentally unable to work.[176]

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[168] *Id.* § 71-3-25(g).

[169] *Id.* § 71-3-25(a), (c), (g).

[170] 19 Cal. 3d 395, 563 P.2d 849, 138 Cal. Rptr. 293 (1977). California's workers' compensation scheme provided a presumption of total dependency for widows but not for widowers. Holding that this provision was unconstitutional under the equal protection clauses of the United States and California constitutions, *id.* at 407, 563 P.2d at 856, 138 Cal. Rptr. at 300, the California Supreme Court invalidated the provision. *Id.* at 411, 563 P.2d at 858, 138 Cal. Rptr. at 302.

[171] 541 F.2d 1204 (6th Cir. 1976), *aff'd mem.*, 431 U.S. 909 (1977).

[172] The challenged provision of the Railroad Act provided in part that a wife of a retired male employee was automatically entitled to a spouse's annuity, whereas the husband of a retired female employee had to prove financial dependence upon his wife for at least one half of his support to receive an annuity. 541 F.2d at 1205-06.

[173] *Id.* at 1210. In fashioning a remedy, the court apparently attempted to extend the statutory benefits to all spouses rather than to invalidate the statute. The Railroad Retirement Act of 1937 was amended by the Railroad Retirement Act of 1974, Pub. L. No. 93-445, 88 Stat. 1305 (codified at 45 U.S.C. § 231a(c)(3)(ii) (1976)). The new act leaves virtually unchanged the sexually discriminatory provisions.

The widower Wengler did not meet the statutory criteria necessary to recover the death benefit, and he claimed the statute violated the fourteenth amendment.[177] The Court, relying on state court decisions such as *Arp* and its own *Goldfarb-Wisenfeld* line of decisions, agreed.[178] The Court held that the statute discriminated against both sexes.[179] The female worker suffered discrimination because her beneficiary, the surviving spouse, was not entitled to the same benefits that a male worker's spouse would be. Likewise, the statute discriminated against men by requiring widowers to prove actual dependence, while the statute, by conclusively presuming widows were total dependents, imposed no such burdens on them.[180]

These cases, and particularly *Wengler,* demonstrate that both the conclusive presumption of female dependency and its concomitant burden on widowers of deceased female employees in the Mississippi statute are unqualifiedly unconstitutional. A bill introduced during the 1980 session of the Mississippi Legislature would have extended lump-sum death benefits to all surviving spouses.[181] Although favorable legislative action would have prevented needless litigation over the statute's validity, the legislature has failed to correct the defect.

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[174] Wengler v. Druggist Mut. Ins. Co., 446 U.S. 142 (1980).

[175] Mo. Rev. Stat. § 287.240 (Supp. 1979).

[176] *Id.* § 287.240 (4)(a).

[177] 446 U.S. at 146. The Missouri Supreme Court rejected this contention, holding that the disparate treatment accorded by the statute was justified because of the difference in economic standing between working men and women.

[178] *Id.* at 152. The Court declined to decide whether the statute should be extended or invalidated, instead remanding the case to the Missouri Supreme Court for a determination of that issue. *Id.* at 152-53.

[179] *Id.* at 147.

[180] *Id.* at 149.

[181] H.R. 640, 1980 Miss. Leg., Reg. Sess.

b. *Policemen's and Firemen's Death Benefit Statutes*

Prior to their recent amendment, Mississippi statutes establishing death benefits for widows of policemen and firemen were susceptible to constitutional attack for similar reasons.[182] Unlike the worker's compensation death benefit statute, which contains some provisions for dependent husbands,[183] these statutes were couched exclusively in terms of the deceased employee being male and the surviving spouse being a "widow." By providing benefits only for widows and not for widowers, the statutes were blatantly unconstitutional. Although the Mississippi Legislature amended sections 21-29-145 and 21-29-255 to eliminate the inequalities between widows and widowers of members of the police or fire departments, the same language in section 21-29-147 was inexplicably overlooked when the amendments were adopted.[184]

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[182] *See* Miss. Code Ann. §§ 21-29-145, -147, -255 (1972) (amended 1980). Women comprise 14.8% of full time and 55.4% of part time police employees and .6% of the fire protection employees in Mississippi. United States Equal Employment Opportunity Commission, 5 Minorities and Women in State and Local Government 133-37 (1975).

[183] Miss. Code Ann. § 71-3-25 (Supp. 1980). *See* note 167 *supra.*

[184] Miss. Code Ann. § 21-29-147 (Supp. 1980) provides in part:

> Should any member of a fire or police department die while a member of said fire or police department, and who has had not less than five (5) years' service with such department there shall be paid . . . as follows:
>
> . . . .
>
> (b) for each full year of active service in excess of twenty (20) years service, an additional payment in a sum equal to one and seven-tenths (1 7/10%) of the same average monthly base salary and longevity pay received by such member in the six-month period next preceding his death . . . to the *widow* of such deceased for the use of herself and the child or children of said deceased, under the age of eighteen (18) years, . . . and after the death or marriage of the *widow,* all payments to *her* shall cease . . . . If the deceased be not survived by *widow* or child or children under the age of eighteen (18) years, but be survived by a father dependent upon him or a mother dependent upon him, or an *unmarried sister* dependent upon him, such payments shall continue to be made to such dependent father or mother or both, so long as each shall live, or if there be no dependent father or mother surviving the deceased, such payments shall continue to be made to the dependent *sister* or dependent *sisters* of the deceased, . . . so long as such beneficiary or beneficiaries, shall remain unmarried. Upon the death or marriage of any such *sisters,* all payments shall cease to her . . . .

Even after amendment, these statutes still provide benefits based on the "archaic and overbroad generalization" that women are financially dependent on men. An illustration of this still extant belief is found in provisions that certain death benefits go to unmarried dependent sister(s) of the employee.[185] These statutes do not limit themselves to unmarried minor sisters nor are they broad enough to apply to unmarried dependent brothers. The only justification for the anachronism is the outmoded notion that a woman is always dependent upon a man. Though the 1980 legislature did amend the statutes to alleviate the discrepancy between widowers and widows, it nevertheless failed to correct the inequality of treatment between unmarried dependent brothers and unmarried dependent sisters.

II. Discrimination in Criminal Statutes

Several of Mississippi's penal statutes, particularly in the area of sex crimes, are based on the antiquated belief that only men commit such crimes. There are several criminal statutes in the Mississippi Code under which only males can be prosecuted. The sex-based classifications in these statutes raise interesting constitutional questions.

A. *The Voyeurism or "Peeping Tom" Statute*

In *Green v. State,*[186] the Mississippi Supreme Court upheld the constitutionality of the Mississippi voyeurism or "Peeping Tom" statute,[187] which penalized only males for such activity.

> It is the intention of the legislature that the benefits authorized by subsection (b) of this section, shall be paid to all qualified and eligible *widows* whose deceased husbands died prior to the effective date of this section (emphasis added).

[185] Miss. Code Ann. §§ 21-29-145, -147, and -255 (Supp. 1980), all contain this provision.

[186] 270 So. 2d 695 (Miss. 1972).

[187] Miss. Code Ann. § 97-29-61 (1972) (amended 1980) formerly provided:

> Any male person who enters upon real property whether the original entry is legal or not, and thereafter prys or peeps through a window or other opening in a dwelling or other building structure for the lewd, licentious and indecent purpose of spying upon the occupants thereof, commonly called a "peeping Tom," shall be guilty of a felonious trespass; and upon conviction, shall be imprisoned in the state penitentiary not more than five years.

Green, convicted under this statute, had based his appeal in part on the equal protection clause of the fourteenth amendment. However, the Mississippi Supreme Court stated: "We are of the opinion that the Legislature, by this statute, took note of the fundamental difference between men and women, and recognized that looking at persons for a lewd, licentious and indecent purpose is an activity traditionally ascribed to men rather than women."[188] Thus, using the minimum scrutiny of the rational relation test as its judicial standard, the court determined that the statute was not based on an "invidious and patently arbitrary sex classification."[189] The court found that since the legislature's purpose was to prevent rape and sex crimes "[d]ue to the possibility of rape following lewd spying, the singling out of males is permissible."[190] Since the evidence did not establish a connection between physical sexual crimes and voyeurism, the court apparently took judicial notice of such a nexus.[191]

B. Anti-Fondling Statute

Subsequent to *Green,* an equal protection defense was successful against the Mississippi anti-fondling law.[192] When the statute was promulgated in 1920, Mississippi's all-male legislature apparently believed that the forbidden fondling or licentious handling of children was exclusively a male crime. In the 1979 case of *Tatro v. State,*[193] the Mississippi Supreme Court recognized that women were capable of commiting such a crime.[194]

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[188] 270 So. 2d at 695.

[189] *Id.* at 697.

[190] *Id. See* Burchfield v. State, 277 So. 2d 623, 625 (Miss. 1973) (court determined that voyeurism could only be committed by males); *cf.* Love v. State, 211 Miss. 606, 618, 52 So. 2d 470, 471 (1951) (child molesting could only be committed by males).

[191] 270 So. 2d at 697.

[192] MISS. CODE ANN. § 97-5-23 (1972) (amended 1980) formerly provided:

> Any male person above the age of eighteen years, who, for the purpose of gratifying his lust, or indulging his depraved licentious sexual desires, shall handle, touch or rub with hands or any part of his body or any member thereof, any child under the age of fourteen years, with or without his consent, shall be guilty of a high crime and upon conviction thereof, shall be fined . . . or be imprisoned in the state penitentiary . . . or be punished by both . . . fine and imprisonment, at the discretion of the court.

[193] 372 So. 2d 283 (Miss. 1979).

Tatro, convicted of child molesting under the "anti-fondling statute," appealed on equal protection grounds. He argued that while men committing the proscribed acts upon children faced incarceration, a woman committing the same acts upon the protected class violated no law.[195]

The Mississippi Supreme Court held that the anti-fondling statute was unconstitutional,[196] rejecting the state's argument that the *Green* rationale was similarly applicable to the anti-fondling statute.[197] As a result of the intervening United States Supreme Court decision in *Craig v. Boren,*[198] the court applied the stricter standard of scrutiny to the anti-fondling statute than the reasonable relationship test given to the voyeurism statute in *Green.* Using the substantial relationship standard,[199] the Mississippi Supreme Court ruled that statutory classification of males as the only punishable offenders was not substantially related to a governmental objective. In fact, the court indicated that not even the lower rational relation standard[200] was satisfied by a classification which subjected only men to prison for commission of an act.[201] The court further noted that the state had failed to establish any public policy or rational basis for this unequal treatment of the sexes.[202]

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[194] *Id.* at 285. *Contra,* Love v. State, 211 Miss. 606, 52 So. 2d 470 (1951), in which the court reversed a fondling conviction because of a failure to allege that the defendant was male. "[T]he fact that [the] defendant is a male," the court stated, "is a *sine qua non* of the crime." *Id.* at 610, 52 So. 2d at 471.

[195] 372 So. 2d at 283.

[196] *Id.* at 285. The Mississippi Supreme Court, although not mentioning the fourteenth amendment, used language from Orr v. Orr, 440 U.S. 268, 283 (1979) (Alabama statute authorizing award of alimony only to females violated fourteenth amendment), Craig v. Boren, 429 U.S. 190, 204 (1976) (gender-based distinction in legal drinking age violated fourteenth amendment), and sex discrimination cases from other states and lower federal courts.

[197] 372 So. 2d at 284.

[198] 429 U.S. 190, 204 (1976) ("substantial relationship" test).

[199] *See* notes 11, 14 and accompanying text *supra.*

[200] *See* note 12 and accompanying text *supra.*

[201] 372 So. 2d at 284.

[202] *Id.* Understandably, the court did not overrule Green v. State, 270 So. 2d 645 (Miss. 1972) ("peeping Tom" statute). Since reversal of Tatro's conviction was an unpopular decision, the court apparently did not wish to exacerbate public outcry by attacking another statute that was not before it.

The dissent in *Tatro* proposed *sua sponte* a judicial rectification of the problem—striking the word "male" from the statute.[203] Although such action would have been popular, easy, and appealing, it would have been a judicial usurpation of legislative prerogative. Only in civil cases should such a judicial solution occur. As correctly pointed out in the majority opinion, the court should never create a crime or extend criminal liability to a new class of offenders.[204]

After *Tatro* was cited as binding precedent in *Catchot v. State*,[205] the Mississippi Legislature corrected the unconstitutional aspects of the anti-fondling statute[206] and several other criminal statutes similarly infirmed. In addition to the anti-fondling statute, the 1980 legislature amended the voyeurism statute[207] and seven other criminal statutes[208] by making the classification of offenders sex-neutral. The legislature's quick response to the *Tatro* decision was commendable; however, the legislature apparently overlooked several sex-discriminatory criminal statutes.

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[203] 372 So. 2d at 285.

[204] *Id.* at 285-87; *cf.* Hudson v. McAdory, 268 So. 2d 916, 922-23 (Miss. 1972) (classification of crime as capital offense is a legislative, not judicial, function). *See generally* Comment, *supra* note 125, at 116 *passim* (judicial extension of statute to classes not contemplated by legislature, in lieu of invalidation of the statute).

[205] 374 So. 2d 807, 808 (Miss. 1979).

[206] S. 2359, 1980 Miss. Leg., Reg. Sess., enacted as ch. 387, 1980 Miss. Laws 706 (amending MISS. CODE ANN. § 97-5-23 (1972)) (deleted the word "male" and referred to potential offenders by both gender pronouns).

[207] S. 2128, 1980 Miss. Leg., Reg. Sess., enacted as ch. 391, 1980 Miss. Laws 708 (amending MISS. CODE ANN. § 97-29-61 (1972)) (deleted the word "male").

[208] S. 2062, 1980 Miss. Leg., Reg. Sess., enacted as ch. 357, 1980 Miss. Laws 645 (amending MISS. CODE ANN. § 97-5-7 (1972)) (prohibition against enticement into employment); S. 2130, 1980 Miss. Leg., Reg. Sess., enacted as ch. 356, 1980 Miss. Laws 645 (amending MISS. CODE ANN. § 97-3-1 (1972)) (abduction of child over age 14 for purpose of marriage); S. 2061, 1980 Miss. Leg., Reg. Sess., enacted as ch. 388, 1980 Miss. Laws 706 (amending MISS. CODE ANN. § 97-29-7 (1972)) (prohibition of guardian-ward sexual relations); S. 2064, 1980 Miss. Leg., Reg. Sess., enacted as ch. 389, 1980 Miss. Laws 707 (amending MISS. CODE ANN. § 97-35-11 (1972)) (abusive language and indecent exposure); S. 2125, 1980 Miss. Leg., Reg. Sess., enacted as ch. 390, 1980 Miss. Laws 707 (amending MISS. CODE ANN. § 97-3-67 (1972)) (carnal knowledge of an unmarried child between ages 12 and 18); S. 2129, 1980 Miss. Leg., Reg. Sess., enacted as ch. 392, 1980 Miss. Laws 708 (amending MISS. CODE ANN. § 97-5-21 (1972)) (prohibiting seduction of chaste child under 18 years of age); S. 2124, 1980 Miss. Leg., Reg. Sess., enacted as ch. 517, 1980 Miss. Laws 1205 (amending MISS. CODE ANN. § 97-29-3 (1972)) (prohibition against teacher-pupil sexual relations).

C. *Miscellaneous Statutes*

There are three miscellaneous sex-discriminatory criminal statutes in the Mississippi Code. One penalizes a male office holder or fiduciary whose wife accepts a bribe with his knowledge.[209] This statute, apparently based on the notion that only males are office holders, imposes no criminal liability on a female office holder or fiduciary whose husband accepts a bribe under similar circumstances. Another statute imputes criminal liability to a father for knowingly allowing his son under the age of sixteen to carry a concealed weapon.[210] Although parental statutory obligations are generally uniform,[211] under this statute the state is unable to charge criminally either a father who allows his daughter to conceal a gun or a mother who permits her son or daughter to carry a concealed weapon. Finally, the "Tramp" statute of 1880[212] limits prosecution to males over the age of sixteen years. Women similarly situated can be prosecuted only under the vagrancy statute which was adopted in 1904.[213]

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[209] Miss. Code Ann. § 97-11-13 (1972) provides in part:

> If any officer, agent, or trustee shall accept any gift, offer, or promise, or if his wife, with his knowledge and consent, shall accept any gift, offer, or promise . . . , he shall, on conviction, be forever disqualified from holding any public office, trust, or appointment, and shall forfeit his office, if any be held, and be imprisoned in the penitentiary . . . or be fined . . . or both.

[210] Miss. Code Ann. § 97-37-15 (1972) provides in part: "Any father who shall knowingly suffer or permit any son under the age of sixteen years to have or to own, or to carry concealed . . . any weapon the carrying of which concealed is prohibited, shall be guilty of a misdemeanor . . . ."

[211] *See, e.g.,* Miss. Code Ann. § 97-5-3 (1972), which provides in part: "*Any* parent who shall desert or wilfully neglect or refuse to provide for the support and maintenance of his or her child or children . . . shall be guilty of a felony . . . ." (emphasis added).

[212] Miss. Code Ann. § 97-35-29 (1972) provides that:

> Any male person over sixteen years of age, and not blind, who shall go about from place to place begging and asking subsistence by charity, and all who stroll over the country without lawful occasion, and can give no account of their conduct consistent with good citizenship, shall be held to be tramps.

[213] Miss. Code Ann. § 97-35-37 (1972) defines, in sex-neutral terms, "vagrants." The possible sentence for violation of the tramp statute, *id.* § 97-35-29, is less than for violation of the vagrant statute, *id.* § 97-35-37. Sentencing disparities could arise if a female were convicted under the vagrant statute for behavior proscribed to males by the tramp

D. Rape and Sodomy Statutes

The Mississippi Code has two basic provisions governing the crime of rape.[214] Section 97-3-65 prohibits forcible rape,[215] as well as carnal knowledge, whether forcible or not, of a child under twelve years of age.[216] Statutory rape, the nonforcible carnal knowledge of a previously chaste person between the ages of twelve and eighteen years, is prohibited by section 97-3-67.[217] Before 1980 both of these statutes applied only to a violation perpetrated against a female. Thus, prior to the recent adoption of the sexual battery statutes,[218] prosecutors had to rely solely

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statute.

[214] *Id.* §§ 97-3-65, -67 (Supp. 1980).

[215] MISS. CODE ANN. § 97-3-65(2) (Supp. 1980) provides:

> Every person who shall forcibly ravish any female of the age of twelve (12) years or upward, or who shall have been convicted of having carnal knowledge of any female above the age of twelve (12) years without her consent, by administering to her any substance or liquid which shall produce such stupor or such imbecility of mind or weakness of body as to prevent effectual resistence, upon conviction shall be imprisoned for life in the state penitentiary if the jury by its verdict so prescribes; and in cases where the jury fails to fix the penalty at life imprisonment the court shall fix the penalty at imprisonment in the state penitentiary for any term as the court, in its discretion, may determine.

[216] MISS. CODE ANN. § 97-3-65(1) (Supp. 1980) provides:

> Every person eighteen (18) years of age or older who shall be convicted of rape by carnally and unlawfully knowing a female child under the age of twelve (12) years, upon conviction, shall be sentenced to death or imprisonment for life in the state penitentiary; provided, however, any person thirteen (13) years of age or over but under eighteen (18) years of age convicted of such crime shall be sentenced to such term of imprisonment as the court, in its discretion, may determine. In all cases where the female child is under the age of twelve (12) years it shall not be necessary to prove penetration of the female's private parts where it is shown the private parts of the female have been lacerated or torn in the attempt to have carnal knowledge of her.

[217] MISS. CODE ANN. § 97-3-67 (Supp. 1980) provides:

> Any person who shall have carnal knowledge of any unmarried person of previously chaste character younger than himself or herself and over twelve (12) and under eighteen (18) years of age, upon conviction, shall be punished either by a fine not exceeding five hundred dollars ($500.00), or by imprisonment in the county jail not longer than six (6) months, or by both such fine and imprisonment or by imprisonment in the penitentiary not exceeding five (5) years; and such punishment, within said limitation, shall be fixed by the jury trying each case, or by the court upon the entry of a plea of guilty.

[218] *Id.* §§ 97-3-95 to -103. The statutes provide in part:

> A person is guilty of sexual battery if he or she engages in sexual penetration with:

on the sodomy statute[219] to protect sexually molested males. The sodomy statute, however, carries a maximum penalty of only ten years, while the common law rape statute permits a maximum penalty of life imprisonment for the rape of a female over twelve years of age. If the female is younger than twelve, the convicted rapist could be subject to the death penalty.[220] Given the possible sentencing disparities between the rape statute and the sodomy statute, defendants in prosecutions for female rape in similarly situated jurisdictions began to raise equal protection arguments as a defense.[221] Since the new sexual battery statute provides for a maximum sentence of thirty years, defendants in common law rape cases may still continue to raise equal protection violations. However, the 1980 amendment of the statutory rape statute which protects previously chaste boys as well as girls was thought by the legislature to preclude any equal protection problems in that particular statute.[222]

(a) Another person without his or her consent; or

(b) A mentally defective, mentally incapacited, or physically helpless person.

Id. § 97-3-95.

For purposes of [this act] the following words shall have the meaning ascribed herein unless the context otherwise requires:

(a) "Sexual penetration" includes cunnilingus, fellatio, buggery or pederasty, any penetration of the genital or anal openings of another person's body by any part of a person's body, and insertion of any object into the genital or anal openings of another person's body.

. . . .

Id. § 97-3-97.

Every person who shall be convicted of sexual battery shall be imprisoned in the State Penitentiary for a period of not more than thirty (30) years; provided, however, that any person convicted of a second or subsequent offense under this act shall be imprisoned in the penitentiary for not less than five (5) years nor more than thirty (30) years.

Id. § 97-3-101.

[This act] shall not be held to repeal, modify or amend any other criminal statute of this state.

Id. § 97-3-103.

[219] MISS. CODE ANN. § 97-29-59 (1972) provides: "Every person who shall be convicted of the detestable and abominable crime against nature committed with mankind or with a beast, shall be punished by imprisonment in the penitentiary for a term of not more than ten years."

[220] *See* note 216 *supra.*

[221] *See, e.g.,* note 225 *infra.*

[222] Prior to amendment MISS. CODE ANN. § 97-3-67 (1972) (amended 1980) provided that "any male person who shall have carnal knowledge of any unmarried female person

In asserting equal protection claims, forcible rape defendants could contend that the forcible rape statute[223] is constitutionally defective either because (1) it does not subject women offenders to criminal punishment or (2) it does not protect males as potential victims. Several defendants thus far have raised the first claim, but with minimal success. Because of human physiology, courts have been reluctant to rule that a woman can force a man against his will to have sexual intercourse.[224] The second claim, however, presents the interesting and compelling argument that the statute is defective because it punishes only those rapists whose victims are women. This argument has been more frequently employed in statutory rape cases, although with limited success.[225]

1. Statutory Rape

Like most jurisdictions, the Mississippi statutory rape statute, before the 1980 amendment,[226] dealt with sexual intercourse between a previously chaste female victim under the age of eighteen and a male perpetrator over the age of eighteen.[227] Under the prior provisions, an eighteen year old boy who had sexual intercourse with his previously chaste seventeen year old girlfriend was subject to criminal prosecution for violation of the

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of previously chaste character younger than himself and over twelve (12) and under eighteen (18) years of age, upon conviction, shall be punished either by a fine . . . or by imprisonment . . . or by both . . . ." For the text of the amended statute, see note 217 *supra*.

[223] *See* note 215 *supra*.

[224] *See, e.g.*, People v. Salinas, 191 Colo. 171, 551 P.2d 703, 706 (1976) (conviction under statutory rape statute constitutional since statute was based on reasonable differentiation of the physiological differences between the sexes); People v. Reilly, 85 Misc. 2d 702, 381 N.Y.S.2d 732, 738 (Westchester County Ct. 1976) (statutory exemption of females as possible perpetrators of rape constitutional because of physical differences between the sexes); Stewart v. State, 534 S.W.2d 875, 876-77 (Tenn. Crim. App. 1975) (rape statute which differentiates between sexes on basis of physiological differences is constitutional).

[225] *See, e.g.*, Hall v. McKenzie, 537 F.2d 1232, 1235 (4th Cir. 1976) (rejecting equal protection attack on disparate penalties in statutory rape statute); Finley v. State, 527 S.W.2d 553, 556 (Tex. 1975) (upholding rape conviction against attack under state equal rights amendment).

[226] MISS. CODE ANN. § 97-3-67 (1972) (amended 1980). *See* note 222 *supra*.

[227] MISS. CODE ANN. § 97-3-67 (1972) (amended 1980).

statutory rape law. However, in the reverse situation there was no criminal violation.

When confronted with such an equal protection defense, most courts have upheld their states' statutory rape laws.[228] Generally, courts have agreed that minors, whether males or females, may suffer psychological injury from sexual intercourse. However, even employing the judicial review standard of a substantial relationship,[229] the courts have concluded that the sex classification serves the important governmental purpose of protecting females from unwanted pregnancies.[230]

Meloon v. Helgemoe[231] was a notable exception to the general trend. In this habeas corpus appeal, the First Circuit Court of Appeals reviewed the constitutionality of New Hampshire's statutory rape law. Applying the *Craig v. Boren* criteria of a "fair and substantial relation" between the state's interest and the statute's purpose,[232] the court analyzed New Hampshire's four justifications for its classification.[233] Two reasons related to the large potential victim pool and the relatively small class of potential offenders.[234] These two rationales were summarily rejected by the court as not substantial under the *Craig v. Boren* test.[235] The third argument, prevention of physical injury resulting from sexual intercourse, and the fourth argument, prevention of pregnancy,[236] were dismissed as hindsight justifications for the statute. As noted by the court, New Hampshire offered no evidence that these latter two reasons were in fact the purpose of the statutory rape law.[237] Therefore, the court held that the gender distinction in the statute was unconstitutional.[238]

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[228] *See, e.g.*, State v. Gray, 122 Ariz. 445, 595 P.2d 990, 992 (1979) (upheld constitutionality of statutory rape statute since it served an important governmental purpose); People v. McKellar, 81 Cal. App. 3d 367, 146 Cal. Rptr. 327, 331 (1978) (substantial relationship to the legislative purpose of preventing pregnancy in females under 18); State v. Brothers, 384 A.2d 402, 404-05 (Del. Super. Ct. 1978) (classification according to sex was reasonable); State v. Rundlett, 391 A.2d 815, 819 (Me. 1978) (served important state objective of protecting young females from physical injury and pregnancy); State v. Thompson, 392 A.2d 678, 680 (N.J. Super. Ct. Law Div. 1978) (reasonably related to valid state interest of protecting the mental and physical well-being of young females).

[229] *See* note 14 *supra*.

[230] *See* note 228 *supra*.

[231] 564 F.2d 602 (1st Cir. 1977), *cert. denied*, 436 U.S. 950 (1978).

[232] *See* note 14 *supra*.

[233] 564 F.2d at 605.

[234] The state maintained:

> (1) part of the class of males under the age of 15, pre-pubescent males, are physiologically incapable of becoming victims of this consensual offense; therefore the class of victims vulnerable to women offenders is smaller than the class of victims vulnerable to male offenders; (2) adult males, due to a psychological disorder known as pedophilia or otherwise, are more likely to seek to commit the offense than adult women; therefore, the class of potential male offenders is larger than the class of potential women offenders . . . .

Id.

State courts since *Meloon* generally have not used its analytical approach. In *Ex parte Groves*,[239] the Texas Court of Criminal Appeals explicitly rejected such an analysis, but nevertheless extended Texas statutory rape law to male and female offenders.[240] This decision was based on a Texas Criminal Code provision which permitted statutory interpretation of "he" as "she" and "male" as "female" in statutes.[241]

The precise issue was finally addressed by the United States Supreme Court in 1981. The Court in *Michael M. v. Superior Court*[242] held that California's statutory rape provision was not constitutionally impaired. In a plurality opinion, the Court applied the *Craig v. Boren* test and found that the statute was substantially related to a legitimate state purpose, preventing teenage pregnancies.

If one legislative purpose for Mississippi's statutory rape provision is the prevention of unwanted pregnancies, as was successfully urged by California in *Michael M.*, the statute's requirement that the victim have been previously chaste[243] renders such an argument curious. Pregnancy is not limited to previously chaste females. The Mississippi Legislature, by amending the statute, defused some potential equal protection defenses to statutory rape prosecutions. However, the statute apparently is still subject to a constitutional challenge because of the requirement of the victim's chastity. Another statute, assault with intent to ravish, similarly protects only previously chaste females,[244] and therefore, bears the seeds of a constitutional challenge.

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[235] *Id.* at 606. *See* note 14 *supra.*

[236] The state set forth the following arguments:

> (3) female children are more likely to suffer physical damage during the commission of the offense than are male children; thus the class of female victims is in danger of more severe injury than their male counterparts; (4) only female victims may become pregnant; thus again the class of female victims may suffer more severe repercussions from the offense than will their male counterparts.

564 F.2d at 605.

[237] *Id.* at 607.

[238] *Id.* at 609.

[239] 571 S.W.2d 888 (Tex. Crim. App. 1978).

[240] *Id.* at 892-93.

[241] TEX. PENAL CODE ANN. tit. 5, §§ 19, 20 (Vernon 1974).

[242] 101 S. Ct. 1200 (1981).

[243] *See* note 217 *supra.*

2. Forcible Rape and Sodomy Statutes

Male victims remain unprotected by the common law rape statute. The judicial requirement of penetration,[245] coupled with the statutory reference to a "female" victim,[246] adds a distinctive sex-bias to the crimes of rape and sodomy.[247] Penetration of the victim's body is a necessary element of the crime of rape of a female over the age of twelve years.[248] However, if the female victim is under the age of twelve years, the statute explicitly provides that penetration is not a necessary element of the offense, although the prosecution still must prove that the female victim's private parts have been torn or lacerated.[249] Under these provisions, equal protection problems may exist in cases in which males are victims of sex crimes.

Only those males or females victimized by males may claim protection under the Mississippi unnatural intercourse statute, and even this protection is limited.[250] Males victimized by women are protected only by the sexual battery law.[251] In 1955, the Mississippi Supreme Court in *State v. Davis*[252] held that penetration per os or per anum was prohibited by the sodomy statute.[253] The *Davis* principle was reiterated in the federal appeals court's decision in *Mississippi Gay Alliance v. Goudelock.*[254] These cases demonstrated that a violation of the Mississippi sodomy statute could occur by penetration per os or per anum by the male sexual organ.[255]

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[244] MISS. CODE ANN. § 97-3-71 (1972) provides:

> Every person who shall be convicted of an assault with intent to forcibly ravish any female of previous chaste character shall be punished by imprisonment in the penitentiary for life, or for such shorter time as may be fixed by the jury, or by the court upon the entry of a plea of guilty.

[245] *See* note 248 *infra*. Note the definition of "penetration" in the sexual battery act, note 218 *supra*. However, this definition appears to be restricted to the sexual battery statute by § 97-3-103, note 218 *supra*.

[246] *See* note 216 *supra*.

[247] The sexual battery statute does not contain such a bias. *See* note 218 *supra*.

[248] *See* Lang v. State, 230 Miss. 147, 158, 87 So. 2d 265, 268 (1956) (construing MISS. CODE ANN. § 2358 (1942), now MISS. CODE ANN. § 97-3-65 (Supp. 1980)) (penetration held necessary element of rape).

[249] *See* note 216 *supra*.

The Mississippi Supreme Court has never determined whether a woman could be an offender under the sodomy statute. Favoring equal application to offenders of either sex is the statute's use of the word "person."[256] Disfavoring equal application to offenders of either sex is the court's determination in *State v. Hill*[257] that penetration by the offender is a necessary element of the offense.[258]

In *State v. Hill,* the Mississippi Supreme Court affirmed a circuit court's sustaining of a demurrer to an indictment. The Mississippi Supreme Court agreed that the indictment, by failing to state penetration, did not charge an offense under the sodomy statute.[259] Under the *Hill* requirement of penetration by the offender, a woman could never be prosecuted under the sodomy statute for forcing a man to commit such an oral act on her body. Nor does the statute prohibit sexual acts committed orally by the perpetrator, regardless of whether the victim is male or female. This definition leaves persons such as the victim in *Hill* unprotected by either the rape statutes or the sodomy statutes, although the recently enacted sexual battery statute should provide protection.[260]

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[250] *See* notes 252 through 260 and accompanying text *infra.*

[251] *See* note 218 *supra.*

[252] 223 Miss. 862, 79 So. 2d 452 (1955).

[253] *Id.* at 864, 79 So. 2d at 452. The indictment read: "[Defendant] did wilfully and feloniously commit the detestable and abominable crime against nature by having unnatural carnal intercourse with one (name omitted), a female person, by inserting his private sexual organs into her mouth and having her to suck them, he being . . . a male person . . . ." *Id.,* 79 So. 2d at 452.

[254] 536 F.2d 1073, 1075 (5th Cir. 1976), *cert. denied,* 430 U.S. 982 (1977).

[255] *Cf.* State v. Mays, 329 So. 2d 65, 65-66 (Miss. 1976) (court noted that crimes against nature traditionally included sodomy, bestiality, buggery, fellatio and cunnilingus), *cert. denied,* 429 U.S. 864 (1976).

[256] *See* note 219 *supra.*

[257] 179 Miss. 732, 176 So. 719 (1937).

[258] *Id.* at 735, 176 So. at 720.

[259] *Id.,* 176 So. at 720. That demurrable indictment read: "[D]id then and there wilfully and unlawfully and feloniously commit the detestable and abominable crime against nature by having unnatural carnal intercourse with Fannie Walker, a female human by sucking her private sexual organs with his mouth, [defendant] being a male."

Many sister jurisdictions have filled this void of protection by finding penetration regardless of whether the sexual organ is that of the perpetrator or that of the victim.[261] That definition of sodomy protects victims in the following situations: (1) male offender and male victim; (2) male offender and female victim; (3) female offender and male victim. However, it does not protect female victims of female offenders. Since prevention of psychological harm is the common justification for these statutes, legislative acts extending protection to all persons seem both appropriate and necessary. The sex-neutral sexual battery statute recently adopted in Mississippi retains a penetration requirement, but defines penetration broadly, and, therefore, may be applicable to female offenders of female victims.[262]

E. Prostitution Statutes

Although the Mississippi prostitution statute[263] is sex-neutral, it nonetheless lends itself to sex discrimination. Since the word "person" is used throughout, rather than the words "male" or "female," the statute cannot be construed as unconstitutional. By its terms it should be applicable to prostitutes of either sex,[264] as well as their customers.[265] However, because of prosecutorial discretion in enforcing the statute, the statute may subtly discriminate against women. Homosexual male prostitutes are likely to be prosecuted under the sodomy statute,[266] rather than the prostitution statute. Heterosexual male prostitutes, in order to be prosecuted at all, probably must be charged with violation of the prostitution statute.[267] However, men are rarely prosecuted either as customers of prostitutes or as prostitutes themselves.[268]

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[260] *See* note 218 *supra.*

[261] *See, e.g.,* State v. Maida, 29 Del. (6 Boyce) 40, 96 A. 207, 208 (1915) (use of any unnatural bodily opening for copulation constitutes sodomy); Comer v. State, 21 Ga. App. 306, 94 S.E. 314, 314 (1917) (female defendant convicted of sodomy for having cunnilingus performed on her by a male); Jones v. State, 17 Ga. App. 825, 88 S.E. 712, 713 (1916) (carnal knowledge may be had by use of the mouth of the defendant); Glover v. State, 179 Ind. 459, 101 N.E. 629, 632 (1913) (legislative intent was to punish sodomy in any form); State v. Simpson, 243 Iowa 65, 50 N.W.2d 601, 603 (1951) (defendant may commit the crime of sodomy by using mouth alone; no penetration by defendant's sexual organ necessary); State v. Guerin, 51 Mont. 250, 152 P. 747, 748 (1915) (common sense dictates that the mouth, as well as the anus, can be used to commit crime of sodomy); *Ex parte* Benites, 37 Nev. 145, 140 P. 436, 436 (1914) (sodomy statute covers entire field of unnatural acts); State v. Start, 65 Or. 178, 132 P. 512, 513 (1913) (statute did not specify into which "opening" penetration must be made); State v. Whitmarsh, 26 S.D. 426, 128 N.W. 580, 583 (1910) (sodomy statute includes every unnatural carnal copulation). *But see, e.g.,* Sledge v. State, 142 Neb. 350, 6 N.W.2d 76, 77 (1942) (fact that sexual organ of complaining witness was involved precluded sodomy conviction; no penetration on the part of defendant).

[262] *See* note 218 *supra.*

[263] MISS. CODE ANN. § 97-29-49 (1972) provides:

Although the prostitution statute is sex-neutral in its wording, the procurement statute[269] suggests that the prostitution

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> It shall be unlawful to engage in prostitution or to aid or abet prostitution or to procure or solicit for the purposes of prostitution, or to reside in, enter, or remain in any place, structure, or building, or to enter or remain in any vehicle or conveyance for the purpose of lewdness, assignation, or prostitution, or to keep or set up a house of ill-fame, brothel or bawdy house, or to receive any person for purposes of lewdness, assignation, or prostitution into any vehicle, conveyance, place, structure or building, or to permit any person to remain for the purpose of lewdness, assignation, or prostitution in any vehicle, conveyance, place, structure, or building, or to direct, take, or transport, or to offer or agree to take or transport, or aid or assist in transporting, any person to any vehicle, conveyance, place, structure, or building, or to any other person with knowledge or reasonable cause to know that the purpose of such directing, taking or transporting is prostitution, lewdness or assignation, or to lease or rent or contract to lease or rent any vehicle, conveyance, place, structure, or building, or part thereof, knowing or with good reason to know that it is intended to be used for any of the purposes herein prohibited, or to aid, abet, or participate in the doing of any of the acts herein prohibited.

[264] *See* 47 MISS. L.J. 279, 300 (1976) (court has never construed prostitution statute as applying only to females).

[265] *See, e.g.*, Sledge v. State, 142 Neb. 350, 6 N.W.2d 76, 77 (1942) (under aiding, abetting, or procurring sections).

[266] *See* note 219 *supra*.

[267] *See* note 263 *supra*.

[268] The female prostitute is a "more visible target for law enforcement." Comment, *The Victim as Criminal: A Consideration of California's Prostitution Law*, 64 CAL. L. REV. 1235, 1281 (1976). Over a two year period in two cities, of 3,287 persons arrested for violations involving heterosexual prostitution, 3,163 were female. *Id.* at 1278.

[269] *See* note 271 *infra*.

statute[270] is directed primarily against female prostitutes. The procurement statute[271] prohibits only procurement of a female for purposes of prostitution and contains no sanctions against similar procurement of a male.

The equal protection arguments discussed in the statutory rape section[272] might also be applicable to the Mississippi procurement statute. The central inquiry is whether the gender classification bears a substantial relation to the state's interest. Although it is difficult to justify the gender-based classification using the test in *Craig v. Boren,*[273] particularly when the analysis of the *Meloon* case is used,[274] the state might defend the classification as protection to the class more likely to be physically injured,[275] an argument similar to California's successful argument in *Michael M.*[276]

CONCLUSION

Although Mississippi has progressed toward elimination of statutory sexism, the job is not completed. In the labor field, woman's role as an economic creature must be fully recognized in order for her to have full economic equality. Economic discrimination against women denies the state and its citizenry the maximum use of the talents and skills of a major portion of its population. The legislature, by enacting statutes promoting economic equality, ensures the fuller future development of human potential. Conversely, any sexually discriminatory statutes in the economic sphere bar women from total participation in society.

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[270] *See* note 263 *supra.*

[271] MISS. CODE ANN. § 97-29-51 (1972) provides:

> It shall further be unlawful to procure a female inmate for a house of prostitution, or to cause, induce, persuade, or encourage by promise, threat, violence, or by scheme or device, a female to become a prostitute or to remain an inmate of a house of prostitution, or to induce, persuade, or encourage a female to come into or leave this state for the purpose of prostitution, or to become an inmate in a house of prostitution, or to receive or give, or agree to receive or give any money or things of value for procuring, or attempting to procure any female to become a prostitute or an inmate in a house of prostitution, or to knowingly accept, receive, levy or appropriate any money or other thing of value without consideration from a prostitute or from the proceeds of any woman engaged in prostitution.

[272] *See generally* notes 226 through 244 and accompanying text *supra.*

[273] *See* note 14 *supra.*

[274] *See* notes 231 through 238 and accompanying text *supra.*

[275] *See* note 228 *supra.*

[276] *See* note 242 and accompanying text *supra.*

In the criminal area, inequality in the law deprives the state of successful prosecution of either male or female wrongdoers. If Mississippi is to ensure adequately its citizens' safety and to punish criminals effectively, its criminal statutes must conform to the requirements of the United States Constitution. Without such conformity, the state only guarantees to the criminal defendant a valid fourteenth amendment defense.

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COMMENT

GUARDIANSHIPS AND CONSERVATORSHIPS OVER PERSONS AND ESTATES IN MISSISSIPPI

The purpose of this article is to explain the procedure for establishing, maintaining, and terminating guardianships and conservatorships in Mississippi. A guardian is a person appointed by the court to protect the interests of one who, because of infancy,[1] unsoundness of mind,[2] alcoholism, drug addiction, a felony conviction, or some other legal disability,[3] is unable to do so himself.[4] A person thus protected is termed a ward.[5] In Mississippi, one can be appointed as guardian of both the ward and his estate, of the ward's estate only, or of the ward only,[6] but all guardians are general guardians[7] to the extent of their appointment.

Loss of memory or understanding due to old age is not deemed to be a legal disability.[8] Instead, when a person cannot manage his own estate because "of advanced age, physical incapacity or mental weakness" but is under no legal disability, a conservator[9] can be appointed to manage the estate.[10] In certain instances, a conservator can also be appointed to take custody of the person.[11]

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[1] Infant, as defined by MISS. CODE ANN. § 1-3-21 (1972), and minors, as defined by § 1-3-27, are all persons under 21 years of age. In certain situations, the disability of minority is removed before age 21. *See, e.g., id.* § 93-19-11 (removing disability of married minor for suits involving marital rights).

[2] Persons of unsound mind include "idiots, lunatics, and persons non compos mentis." *Id.* § 1-3-57.

[3] The preceding are the stated legal disabilities, but the list is not exhaustive. *Id.* § 1-3-58 (Supp. 1980).

[4] Prudential Ins. Co. v. Gleason, 185 Miss. 243, 271, 187 So. 229, 232 (1939) (partition suit by minor child acting as guardian of her brother and sisters after having disability of minority removed).

[5] MISS. CODE ANN. § 1-3-58 (Supp. 1980).

[6] *Id.* § 93-13-15.

[7] The concept of limited guardianships, as opposed to general guardianships, is now gaining recognition in some states. A limited guardianship recognizes that there are different degrees of disability requiring different amounts of supervision. *See* WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1980-81) (granting superior court power to appoint limited guardians of disabled, incompetent, or minor persons).

[8] Scott v. United States, 190 F.2d 134, 136 (5th Cir. 1951). Neither is a person deemed to be under a legal disability solely because of eccentric acts. The test of a legal

I. JURISDICTION AND VENUE

The chancery court, historically the superior guardian of all infants and persons of unsound mind,[12] now has both statutory[13] and constitutional[14] jurisdiction over all matters pertaining to these persons.[15] In the exercise of this jurisdiction, the court controls all litigation on behalf of or against the ward[16] and can

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disability "is the ability to know and understand the nature, character and effect of one's acts." *Id.*

[9] Both guardians and conservators are fiduciaries. MISS. CODE ANN. §§ 27-7-3(d), 91-11-3(d) (1972). A fiduciary relationship is one in which a person has the confidence of another and, as a result, influence over him. Wofford v. Wofford, 244 Miss. 442, 456, 142 So.2d 188, 194 (1962) (action for reformation of deed).

[10] MISS. CODE ANN. § 93-13-251 (1972).

[11] *Id.*

[12] Union Chevrolet Co. v. Arrington, 162 Miss. 816, 826, 138 So. 593, 595 (1932) (suit seeking to overturn guardian's settlement of ward's wrongful death claim); *see* Martin v. DeJarnette, 185 Miss. 76, 82, 187 So. 202, 203 (1939) (an insane person is the ward of the chancery court). Since the chancery court has long had the discretionary authority to appoint guardians, the court's appointments are difficult to overturn. Spaun v. Collins, 18 Miss. (10 S. & M.) 624, 625 (1848) (petition by ward's uncle to be appointed guardian and to have a stranger removed).

[13] *See* MISS. CODE ANN. § 9-5-141 (Supp. 1980) (granting chancery clerk power to handle business of minors and persons of unsound mind). The chancery clerk may appoint guardians for persons of unsound mind, minors, and convicted felons, and make all orders and issue all process necessary for the collection and preservation of their estates. *Id.*

[14] *See* MISS. CONST. art. 6, § 159 (granting chancery court full jurisdiction over business of minors and persons of unsound mind).

[15] *In re* Heard's Guardianship, 174 Miss. 37, 41-42, 163 So. 685, 686 (1935) (petition asking that decree naming petitioner as guardian be set aside); *see* Mabrey v. Hoye, 124 Miss. 144, 152, 87 So. 4, 4 (1921) (suit by sheriff to obtain custody of incompetent in Mississippi Insane Hospital).

[16] Newsom v. Federal Land Bank, 184 Miss. 318, 340, 185 So. 595, 602 (1938) (suit on behalf of ward against guardian to recover damages caused by guardian's alleged negligence in running the guardianship). This includes all litigation which affects the guardianship, suits between the guardian and ward, suits between the guardian and third persons, and suits against the guardian for causes of action against the ward. *Id.*, 185 So. at 602.

supervise the management of the guardianship.[17] It is within the chancery court's discretion to determine what is most advantageous to the ward and to order that the guardianship be managed acccordingly.[18]

The chancery court of the county of an incompetent's residence has jurisdiction to appoint a guardian for the incompetent.[19] Exclusive jurisdiction to appoint a guardian for a minor is vested in the court of the county in which the minor resides at the time of his parent's death, if the minor has no property in another county.[20] The chancery court of the county in which property of a nonresident is located can appoint a guardian of the nonresident's estate.[21]

Venue for all suits involving a guardian's performance in managing the ward's estate, including the guardian's accounts and settlement, is the county in which the guardian is appointed.[22]

II. Establishing the Guardianship

A. *Guardianships of Minors*

Chancery courts assume jurisdiction over minors only when there is a failure of the natural guardianship.[23] If both parents are living, they act jointly as the natural guardians of their minor children[24] and share equal responsibility for protecting, educating,[25] and maintaining them.[26] If either parent dies or becomes incapable of acting as guardian, the surviving parent, if suitable,[27] becomes the sole guardian.[28] If there is a living parent who is suitable, a court-appointed guardian is not entitled to custody of the child.[29]

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[17] *Id.* at 337, 185 So. at 600. The court can inquire into whether the guardian has acted diligently in managing the guardianship, including the ward's property. *Id.* at 337-38, 185 So. at 601. The chancellor is not personally bound to make such an inquiry, but may appoint assistants as they are needed. *Id.* at 337, 185 So. at 600-01.

[18] Thompson Funeral Home, Inc. v. Thompson, 249 Miss. 472, 479, 162 So. 2d 874, 877 (1964) (suit for specific performance of option, granted by the guardian, to sell incompetent's property).

[19] Miss. Code Ann. § 93-13-13 (Supp. 1980). If the incompetent has an estate, the court can appoint a general guardian over the person, the estate, or both the person and estate. If the incompetent has no estate, the court can appoint a general guardian only over the person. *Id.*

[20] *In re* Guardianship of Watson, 317 So. 2d 30, 32 (Miss. 1975) (grandmother of children whose parents were killed applied for appointment as guardian).

[21] Duke v. State, 57 Miss. 229, 231 (1879) (suit by ward, a resident of Tunica County, on bond of guardian who was appointed in Pontotoc County). This power pertains to persons in other states adjudged to be of unsound mind or to Mississippi residents confined in out-of-state insane asylums. The chancery court of a county where a debt is due or cause of action exists may also appoint such a guardian. Miss. Code Ann. § 93-13-123 (1972).

[22] Miss. Code Ann. § 11-5-1 (1972).

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[23] Kilgrow v. Kilgrow, 268 Ala. 82, 107 So. 2d 885, 888-89 (1959) (court applied rule to disavow jurisdiction over husband's request for injunctive relief from wife's interference with their child's education). The natural guardianship can fail because of divorce, separation, parental neglect, or the parent's "incapacity, unfitness or death." 107 So.2d at 888.

[24] MISS. CODE ANN. § 93-13-1 (1972).

[25] *Id.* The Mississippi Supreme Court has concluded that the principal duties owed by parents to their children are those of protection, maintenance, and education. Education includes both moral and intellectual training. *In re* Faust's Guardianship, 239 Miss. 299, 307, 123 So. 2d 218, 220 (1960) (appeal from decree ordering father to leave his children in certain school and to allow them to attend the church of their choice). Courts cannot interfere with the education of children whose parents have not forfeited the right to control the children's education. *Id.* at 305, 123 So. 2d at 219, 220.

A father has a duty to send his qualified children to college if he is financially able to do so. Pass v. Pass, 238 Miss. 449, 455, 118 So. 2d 769, 771-72 (1960) (petition by divorced wife for increase in child support). This duty is not absolute, however, but depends instead on whether the child's behavior "makes the child worthy of the additional effort and financial burden that will be placed on the father." Hambrick v. Prestwood, 282 So. 2d 474, 477 (Miss. 1980) (court decreed that divorced father had no duty to pay for daughter's college education because she intensely disliked him and had refused contact with him).

[26] MISS. CODE ANN. § 93-13-1 (1972). Parents are also jointly responsible for the management of the estates of their minor children. Additionally, parents are statutorily liable, in an amount not to exceed $1,000, for damage to the property of others committed by the malicious and wilful acts of their children between the ages of 10 and 18. *Id.* at § 93-13-2(1) (Supp. 1980). The statute provides that the authorized action is in addition to any other available remedies. *Id.* § 93-13-2(2). The statutory purpose is to allow recovery from parents where such recovery would otherwise be unavailable. *Id.* § 93-13-2(3). The statute does not, however, "apply to parents whose parental custody and control of such child have been removed by court order or decree." *Id.* § 93-13-2(1) (Supp. 1980).

[27] *See, e.g.,* Simpson v. Rast, 258 So. 2d 233, 236 (Miss. 1972) (court applied rule to allow suitable father to recover custody of his children from the husband of his deceased ex-wife); Hosey v. Myers, 240 So. 2d 252, 253 (Miss. 1970) (unsuitable father not entitled to custody after death of divorced wife); Mitchell v. Powell, 253 Miss. 867, 884, 179 So. 2d 811, 819 (1965) (suitable father entitled to custody of child as against relatives of deceased ex-wife); Kinnaird v. Lowery, 102 Miss. 557, 562, 59 So. 843, 844 (1912) (suitable surviving mother entitled to custody as against grandmother with whom the children wished to remain). The Mississippi Supreme Court has stated that a parent is unsuitable to act as a guardian upon "a clear showing . . . that the conduct of the parent is so immoral as to be detrimental to the child, or . . . that the parent is unfit mentally or

The law strongly prefers that children be left in the custody of one or both parents[30] and presumes that natural parents will most effectively promote their child's best interests.[31] Consequently, one seeking to remove a child from the custody of his parents has the burden of proving either that the parents are not suitable guardians[32] or that they have abandoned the child.[33] The child's welfare is the most important consideration to a court[34] in awarding custody.[35]

If a minor's parents are separated, the court may appoint either as guardian,[36] and if both are suitable neither has prefer-

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otherwise to have the custody of his or her child." Simpson v. Rast, 258 So. 2d 233, 236 (Miss. 1972).

[28] MISS. CODE ANN. § 93-13-1 (1972).

[29] *Id.* § 93-13-5 (Supp. 1980). Therefore, if a guardian is appointed for a child who has a suitable parent, the parent is entitled to custody of the child and the guardian is entitled to manage the child's estate. McDowell v. Bonner, 62 Miss. 278, 279-80 (1884) (petition by minor's aunt to be appointed guardian even though the child's father was living).

[30] Mahaffey v. Mahaffey, 176 Miss. 733, 740, 170 So. 289, 292 (1936) (court recognized policy, but committed incorrigible minor child to state training school because divorced mother was unable to control the child).

[31] Hibbette v. Baines, 78 Miss. 695, 703, 29 So. 80, 81 (1900) (suitable father awarded custody as against maternal relative whom his ex-wife had appointed upon her death).

[32] *See* note 27 *supra*. Also, a parent may be unsuitable if unwilling or unable to control the child to the extent that, due to immorality or delinquency, the child obviously is in serious danger of becoming an unacceptable member of society. Mahaffey v. Mahaffey, 176 Miss. 733, 740, 170 So. 289, 292 (1936) (appeal from enforcement of decree committing minor child to state industrial training school).

[33] Hibbette v. Baines, 78 Miss. 695, 703, 29 So. 80, 81 (1900). Even though a parent may otherwise be suited to have custody of a child, the parent is not entitled to custody if the child has been abandoned. *Id.*

[34] A guardian may be appointed by either the court or the chancellor in vacation. MISS. CODE ANN. § 93-13-1 (1972). The court cannot remove a child from the custody of his parents without first giving them notice of the custody hearing and an opportunity to be heard at the hearing. Britt v. Allred, 199 Miss. 786, 789, 25 So. 2d 711, 712 (1946) (decree granting custody to another was void since no notice was given to persons standing *in loco parentis* to the minor).

[35] Forbes v. Warren, 184 Miss. 526, 532-33, 186 So. 325, 326 (1939) (custody awarded to maternal grandparents despite suitable father, since in best interest of the child). Important elements in determining what is in the child's best interest are the sex, age, physical condition, and wishes of the child. *Id.*, 186 So. at 326.

[36] MISS. CODE ANN. § 93-13-3 (1972). The state in which the parent having lawful

ence.[37] As in other contests for custody of a minor child, the court's chief concern is the welfare of the child.[38] When custody is awarded to the mother, however, the father continues to be obligated to support his minor child.[39]

A parent may appoint a testamentary guardian for a minor child, and may do so even if the child is under another disability.[40] A parent may also appoint a testamentary guardian for an adult child who is under a legal disability.[41] This appointment is ineffective, however, if the other parent is still living.[42] After a testamentary guardian is qualified,[43] he has the same rights, liabilities, and duties as a guardian appointed by the court.[44]

If a testamentary guardian is not appointed, or has been ap-

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custody resides has jurisdiction over the guardianship. *Id.*

[37] Bland v. Stoudemire, 219 Miss. 526, 531, 69 So. 2d 225, 227 (1954) (petition by mother for custody of her child after divorce); Boswell v. Pope, 213 Miss. 31, 37, 56 So. 2d 1, 3 (1952) (same).

[38] *See* note 35 and accompanying text *supra;* Shoffner v. Shoffner, 244 Miss. 557, 562, 145 So. 2d 149, 151 (1962) (petition by mother seeking increased child support and cross bill by father seeking custody of the children); Bland v. Stoudemire, 219 Miss. 526, 531, 69 So. 2d 225, 227 (1954) (mother's custody petition); Boswell v. Pope, 213 Miss. 31, 37, 56 So. 2d 1, 3 (1952) (same).

[39] Pass v. Pass, 238 Miss. 449, 456, 118 So. 2d 769, 772 (1960) (petition by divorced wife for increase in child support from father).

[40] MISS. CODE ANN. § 93-13-7 (Supp. 1980). The instrument creating the guardianship takes effect upon the death of the parent. To be effective, however, the instrument must be either wholly written and signed by the parent, or, if not wholly written, must be attested to by two or more credible witnesses, other than the appointed guardian. *Id.*

[41] *Id.* Prior to the amendment of MISS. CODE ANN. § 93-13-7, a parent could not appoint a testamentary guardian for an adult child, even if under another disability. *See, e.g.,* Jones v. Parker, 216 Miss. 64, 68, 61 So. 2d 681, 682 (1952) (contesting decree granting recovery for incompetent of money owed by prior guardian, but not allowing interest).

[42] *See* Campbell v. Mansfield, 104 Miss. 533, 547, 61 So. 593, 593 (1913) (appointment of testamentary guardian held ineffective because mother of children was still living). A guardian so appointed becomes trustee over the property devised and bequeathed to the children and over which the testator showed a clear intent for the guardian to manage. *Id.,* 61 So. at 593.

[43] A guardian appointed in a will must appear before the chancery court and give written acceptance of the guardianship. The instrument of appointment, which may be contested in the same manner as a will, and the acceptance are recorded in the records of wills. If the guardian fails to qualify within three months of his gaining the right of guardianship, or earlier if the court so directs, the guardian will be summoned to accept or renounce the guardianship. The court will appoint someone else if the guardian fails to appear, fails to qualify, or renounces. MISS. CODE ANN. § 93-13-9 (Supp. 1980).

[44] *Id.* § 93-13-11.

pointed but does not qualify, the chancery court may appoint a guardian for the minor.[45] The court must give preference, however, to the natural guardian or next of kin,[46] who has a legal right to be appointed guardian[47] unless manifestly unsuited to care for the minor and his estate.[48] If a suitable relative applies, the court has a duty to remove a stranger who has been appointed.[49] Notice must be given to the next of kin[50] before a guardian is appointed by the court, so that the most qualified person can be appointed.[51] Although a minor over fourteen years of age and under no other disability may be allowed by the court to select a general guardian,[52] the selection will prevail only if the court finds that the person selected is suitable. If the person selected is unsuitable, the court can appoint someone else.[53] If no one qualifies, the chancery clerk will be appointed by the chancery court and act under its direction.[54]

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[45] *Id.* § 93-13-13 authorizes the court to appoint a general guardian over the estate, or person and estate, of a minor having either real or personal property. Personal property includes a minor's claims for damages arising out of tort. Gunter v. Henderson Molpus Co., 149 Miss. 603, 616, 115 So. 720, 722 (1928) (suit for wrongful death of child).

[46] Miss. Code Ann. § 93-13-13 (Supp. 1980).

[47] Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (removal of relative as guardian of minor and appointment of the minor's mother). Courts prefer to appoint one person to serve as guardian of both the minor and his estate, especially when the minor's parent acts as guardian. *Id.,* 133 So. at 605.

[48] Allen v. Peete, 25 Miss. 29, 31 (1852) (minors' uncle appealed awarding of their guardianship to a stranger). Such a relative is preferred, however, over an equally suited stranger. *Id.*

[49] Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (suit by ward's mother for removal of court-appointed guardian and appointment of herself); Spaun v. Collins, 18 Miss. (10 S. & M.) 624, 626 (1848) (petition by ward's uncle to be appointed guardian and to have stranger removed).

[50] Under Miss. Code Ann. § 93-13-281 (Supp. 1980), the parent or parents of the ward must be joined as defendants. If neither parent is living, two of the ward's adult kin within the third civil law degree must be joined as defendants. Process is issued as in other suits.

If the ward has been legally adopted, the adoptive parents must be joined. If custody of the ward has been awarded to one natural parent, however, only that parent need be joined.

A guardian *ad litem* will be appointed at the court's discretion if there are no adult kin within the third civil law degree. Service of process is not needed if the parent or parents join in the petition with the guardian. If the parents are not living, no service is necessary if two adult kin within the third civil law degree join in the petition. No one must be made a defendant if the ward has no living parent, kin within the third degree whose place of residence is known by the ward, or next friend.

If the ward has been legally adopted, the adoptive parents or next of kin can join with the guardian in the petition in place of the natural parents. If custody of the ward has been awarded to one natural parent, only that parent need join with the guardian in the petition.

If the ward is married, the ward's spouse, if 21, and one other adult kin within the third civil law degree may be joined as defendants or join in the petition. The spouse, if under 21, and two adult kin within the third civil law degree may join as defendants or join in the petition. *Id.*

B. *Guardianships of Adults*

The chancellor can appoint a guardian for adult persons who need mental treatment[55] and are incapable of caring for themselves or their property. Such a guardian may be appointed either by motion of the chancellor or the chancery clerk, or by petition of any relative, friend, or interested party.[56] The preference for next of kin as guardians of minors[57] does not extend to the next of kin of the adult incompetent.[58] Instead, the appointment of guardians for adult incompetents and their estates is left to the discretion of the chancery court.[59] If no one else qualifies, the chancery clerk can be appointed.[60]

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[51] *In re* Guardianship of Watson, 317 So. 2d 30, 33 (Miss. 1975) (grandmother applied for appointment as guardian of orphaned grandchildren).

[52] MISS. CODE ANN. § 93-13-13 (Supp. 1980). Such a minor can select a guardian of the person or estate, but the guardian must be a resident of the county where the guardianship proceedings are pending. If the guardian selected is a resident of another county, the proceedings are moved to the guardian's county of residence and the minor becomes a resident of that county. If the minor fails to select a guardian, or the guardian selected fails to qualify, the court will select a guardian. *Id.* A minor, upon reaching the age of 14, can select a guardian even though one has previously been appointed by the court, unless the previously appointed guardian's authority is derived from a will. Sessions v. Kell, 30 Miss. 458, 464 (1855) (orphan, upon reaching 14, petitioned to have court appointed guardian removed and the orphan's brother appointed).

[53] Maskew v. Parker, 127 Miss. 160, 164-65, 89 So. 909, 910 (1921) (suit contesting appointment of guardian selected by ward who was over 14 years old).

[54] MISS. CODE ANN. § 93-13-21 (Supp. 1980). The clerk is liable, as are other guardians, except that he is not bound to incur any costs. The clerk must post a special cumulative bond as guardian, and his official bond also covers his liability as guardian. When the clerk's term expires, he must make a final settlement and deliver the ward's property to the successor guardian or other person designated by the court. The clerk is allowed a maximum of 10% of the estate as a commission on final settlement. *Id.*

[55] MISS. CODE ANN. § 41-21-61(c) (Supp. 1980) provides that:

> Person in need of mental treatment . . . means any person afflicted with mental illness if that person, as a result of such mental illness, is reasonably expected at the time the determination is being made or within a reasonable time thereafter to intentionally or unintentionally physically injure himself or other persons, or is unable to care for himself so as to guard himself from physical injury, or to provide for his own physical needs. "Mental illness," as employed in this definition, does not include mental retardation.

[56] *Id.* § 93-13-111. If the chancellor appoints a guardian, costs of the proceedings are paid out of the ward's estate. If no guardian is appointed, costs are paid by the person

Under certain circumstances,[61] the chancery court of the county in which any property of a Mississippi citizen is located may appoint a guardian of that person's estate even though the person has not been or has been improperly adjudged of unsound mind.[62] Such a guardian has the same rights, duties, and liabilities as guardians of residents who have been declared legally to be of unsound mind.[63]

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bringing the proceeding. Proceedings are instituted by the filing of a sworn petition in the chancery court of the alleged incompetent's residence. The alleged incompetent is summoned to a hearing at which all interested parties can present evidence of the person's need for mental treatment. *Id.* Since § 41-21-61(c) excludes mental retardation from the definition of mental illness, a guardian for a retarded adult cannot be appointed under § 93-13-111. Such guardians are normally appointed under the court's general constitutional authority over incompetents. *See* note 14 *supra.*

[57] *See* notes 46 through 51 and accompanying text *supra.*

[58] Muse v. Muse, 76 Miss. 372, 373-74, 24 So. 168, 168 (1898) (appeal of appointment of another to be guardian of non compos mentis brought by next of kin).

[59] Pinson v. Combs, 215 So. 2d 879, 879 (Miss. 1968) (guardianship contest between adult daughters and second wife of incompetent); Muse v. Muse, 76 Miss. 372, 374, 24 So. 168, 168 (1898) (guardianship contest between next of kin and widow of incompetent's brother).

[60] MISS. CODE ANN. § 93-13-129 (1972). A clerk so appointed is subject to the same provisions as he would be if appointed guardian of a minor. *Id.* For provisions for appointment of the clerk as guardian of a minor, see note 54 and accompanying text *supra.*

[61] MISS. CODE ANN. § 93-13-125 (1972) applies only to persons who:

> (1) have been continuously confined in a mental hospital operated by the State of Mississippi or by the United States government within the State of Mississippi for a period of more than one year and are still so confined, (2) are of unsound mind, (3) are mentally incapable of taking care of their estates, and (4) are incapable of responding to process.

[62] *Id.* The petition for appointment may be made by any relative, friend or other interested person. If a certificate from the director of the hospital confirming the conditions alleged is attached, no process on the director or further proof is required. The guardianship may be terminated when the court is satisfied the incompetent has been restored to sanity. *Id.*

[63] *Id.* § 93-13-127.

C. Guardianships in Extraordinary Circumstances

The chancery court[64] may appoint a guardian for the person and estate of an alcoholic or habitual drug user,[65] or may direct that the alcoholic or addict be committed to an asylum.[66] A guardian may also be appointed by the court[67] for the estate of a person sentenced to prison for one year or more,[68] or for a member of the armed forces or merchant marine who is officially listed as missing in action or captured.[69]

D. Guardian Ad Litem and Temporary Guardian

The court, in its discretion,[70] can appoint a guardian *ad litem* to protect the interests of a minor or a person of unsound mind.[71] Since the language of the statute is permissive, however, the failure to appoint a guardian does not render a decree void.[72] Actual or constructive notice to the minor or person of unsound mind is necessary in order for the court to have jurisdiction to make the appointment.[73] A temporary guardian must be appointed to act as guardian during an appeal from the granting of letters of guardianship.[74]

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[64] A guardian may be appointed by the chancery court of the county of residence of the alcoholic or drug addict. *Id.* § 93-13-131.

[65] Drug users as referred to by the statute are those persons who habitually use cocaine, opium or morphine. *Id.*

[66] *Id.* A relative or friend of such person may petition the court to have a guardian appointed. If the court finds that there are probable grounds for appointment of the guardian, the alleged alcoholic or drug addict is summoned and a hearing is held. The court, if necessary, may appoint a guardian over both the person and estate. If a guardian is appointed, the ward's estate pays all costs. *Id.*

[67] The chancery court of the county of the person's residence or of the county in which the person owns property may appoint a guardian. *See id.* § 93-13-135 (appointment of guardians for convicts); *id.* § 93-13-161 (appointment of guardians for servicemen missing in action or captured).

[68] *Id.* § 93-13-135. The guardianship terminates when the term of imprisonment ends or when the convict dies. The guardian is then allowed a reasonable allowance for his services. *Id.*

[69] *Id.* § 93-13-161. This may be done only if the missing person has not previously appointed someone to act on his behalf. Proceedings are instituted by a petition filed by anyone authorized by law to act as guardian, and preference is given to the next of kin. The guardian has the same powers as the guardians of the estates of minors or adults, depending on whether the absentee is an adult or minor, and may be required by the court to post bond.

The court can terminate the guardianship upon the filing of a petition that is either signed by the absentee or submitted by an attorney having the power of attorney. The guardianship can also be terminated upon the death of the absentee and appointment of an executor or administrator of his estate. *Id.*

[70] Although appointment is not mandatory, a guardian *ad litem* should be appointed when the court becomes aware of the ward's incompetence. Scott v. United States, 190 F.2d 134, 136 (5th Cir. 1951) (suit to set aside condemnation of incompetent's property). *But see* M'Allister v. Moye, 30 Miss. 258, 263 (1855) (guardian *ad litem* must be appointed if guardian is personally interested in the suit so as to prejudice the minor's rights).

III. Rights, Duties, Liabilities

A. *Bond*

Unless the requirement is dispensed with,[75] every guardian must post bond made payable to the state before he has the authority to act.[76] The court may set the amount and designate the sureties of the bond,[77] and, if the court determines the bond to be insufficient or the surety to be of doubtful solvency, it can require that a new bond be posted and that the guardian be removed if this is not done.[78]

A guardian and his sureties are liable for all assets of the ward's estate which the guardian received and for those which he could have collected had he acted diligently,[79] but they are not liable for the ward's funds that are loaned in accordance with a court order.[80] A surety who believes that he may become liable on the bond may petition the chancery court to be discharged.[81] His right to discharge depends on a finding by the court that there is a substantial danger of loss.[82] If discharged, he remains liable for all past breaches of the bond, but is not liable for future breaches.[83]

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[71] Miss. Code Ann. § 9-5-89 (1972). The court may also allow the guardian *ad litem* reasonable compensation. *Id.*

[72] *Id.*

[73] M'Allister v. Moye, 30 Miss. 258, 262-63 (1855).

[74] Miss. Code Ann. § 93-13-19 (1972). The court or clerk must appoint such a guardian if there is no one qualified to act as guardian pending appeal. The temporary guardian must post bond and serves until the appeal is decided. *Id.*

[75] Bond does not have to be posted if it has been waived by will or other writing. Nor is there a bond requirement for the part of the ward's assets that are deposited at the court's discretion in a fully insured bank or savings and loan account. *Id.* § 93-13-17 (Supp. 1980).

[76] *Id.* The bond is recorded, and may be sued on even though the appointment is not legal. *Id.*

[77] *Id.*

[78] *Id.* § 93-13-23 (1972). It is left to the court's discretion to determine what can render a bond insufficient. State v. Hull, 53 Miss. 626, 644 (1876) (action on bond of surety who alleged bond was taken out without authority of law). Posting of the additional bond does not relieve the original sureties of future liability. *Id.* at 646; *cf.* notes 81 through 83 and accompanying text *infra*. The sureties of the new bond are not liable for breaches that take place prior to execution of the new bond unless they plainly manifest an intent to be so liable. Aetna Indem. Co. v. State, 101 Miss. 703, 719, 57 So. 980, 982 (1912) (suit against sureties on two bonds for recovery of funds converted to guardian's use).

B. *Guardian's Rights and Liabilities*

After the guardian qualifies, the court shall decree that the ward's property be delivered to the guardian,[84] who must then use reasonable diligence in locating and taking possession of all the ward's property in Mississippi.[85] If the guardian is appointed over the ward's person, the ward has a legal duty to submit to the authority of the guardian.[86]

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[79] *See, e.g.,* Ames v. Williams, 74 Miss. 404, 409, 20 So. 877, 877 (1896) (surety appealed from judgment of liability for funds the guardian could have collected while alive); McWilliams v. Norfleet, 63 Miss. 183, 186 (1885) (guardian liable for assets he could have collected if duties were properly discharged). If the guardian is held liable for interest, the surety is also liable for interest. State v. Hull, 53 Miss. 626, 648 (1876).

[80] Cohn v. Winslow, 115 Miss. 275, 282, 76 So. 264, 265 (1917) (suit to hold surety liable for loss of funds deposited in insolvent bank under court order). The court in *Cohn* held that even if the guardian agrees to remain liable on money deposited by court order into a bank which subsequently becomes insolvent, the surety is not liable if he made no similar agreement. *Id.*, 76 So. at 265.

[81] MISS. CODE ANN. § 93-13-23 (1972). Such a surety may also ask the court to require the guardian to execute counter security. Foster v. Bisland, 23 Miss. 296, 297 (1852) (petition by surety to be discharged).

[82] *See* MISS. CODE ANN. § 93-13-23 (1972) (procedure and reasons for removing guardian). If the court finds that the complaint is well-founded, the guardian may be required to give new bond and can be removed for failure to do so. *Id.* A surety is not entitled to be relieved of liability simply because he desires to be discharged. Coleman v. Lamar, 40 Miss. 775, 777-78 (1866) (surety's suit to require guardian to post a new bond).

[83] *See* Bell v. Rudolph, 70 Miss. 234, 240, 12 So. 153, 153 (1892) (surety held responsible for delinquencies occurring before he was relieved on his bond and new bondsmen appointed).

[84] MISS. CODE ANN. § 93-13-31 (1972). Failure of the guardian after due notice to comply with the decree is sufficient cause to sue the guardian on his bond or to attach, fine, or imprison him for contempt. *Id.*

[85] *In re* Guardianship of Horne, 178 Miss. 714, 729, 173 So. 660, 663 (1937) (suit attacking validity of guardian's final accounting). There is no duty to find out everything discoverable but only to use reasonable diligence to determine the extent of the property belonging to the ward in the state. Newsom v. Federal Land Bank, 184 Miss. 318, 339, 185 So. 595, 601 (1939).

Section 93-13-38 of the Mississippi Code[87] states the general duties and powers of all guardians in Mississippi.[88] A guardian must use reasonable diligence to improve his ward's estate[89] and can collect and sue for debts due the ward.[90] He is also empowered to pay the debts of the ward that have been probated,[91] although no debts are payable from the ward's exempt property.[92]

The chancery court and the chancellor in vacation are authorized to decree the sale or lease[93] of all or part of the real[94] or personal property of a ward under terms the chancellor may impose[95] if he finds it to be in the ward's best interest.[96] The court can require that the guardian post additional bond when a sale of the ward's real property is ordered,[97] and the sale is void if the additional bond is not posted.[98] A decree issued pursuant to a guardian's request for the sale of land owned by his ward is also void unless the ward is present at the proceeding or a guardian *ad litem* is appointed.[99] However, acceptance by an adult ward of the purchase price of land sold under a void decree acts as a confirmation of the sale and he is estopped from claiming legal title.[100] If the guardian purchases the ward's property at a sale, the purchase is voidable at the election of the ward, even if the sale is rightful.[101]

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[86] Keith v. Miles, 39 Miss. 442, 444 (1860) (holding void for lack of consideration a promise by guardian to pay ward's board and school tuition in order to induce the ward to return to guardian's control).

[87] MISS. CODE ANN. § 93-13-38 (Supp. 1980).

[88] MISS. CODE ANN. §§ 439-40 (1942) (current version at MISS. CODE ANN. § 93-13-137 (1972)), previously stated the duties and powers of guardians of persons of unsound mind, convicts, alcoholics, and drug addicts. This section was amended by Act of April 27, 1972, ch. 408, §§ 15, 16, 1972 Miss. Laws ch. 467, *codified at* MISS. CODE ANN. § 93-13-137 (1972), to be applicable to all wards, and was renumbered as MISS. CODE ANN. § 93-13-38 (Supp. 1980).

Additionally, § 91-9-209 provides that the guardian of the estate of a beneficiary ward under a legal disability may act for the beneficiary in making any appointment, approving any accounting, and giving any direction permitted under §§ 94-9-201 to -213 (general trust provisions concerning the resignation and succession of trustees). Furthermore, since most state statutes, including Mississippi's, define the powers and duties of the guardian in general terms, the common law continues to be controlling in many instances. 39 AM. JUR. *Guardian and Ward* § 61 (1968).

[89] MISS. CODE ANN. § 93-13-38 (Supp. 1980). In addition, § 93-13-41 provides that a guardian shall not commit waste on the real estate of his ward. As long as the guardian acts with reasonable diligence, he cannot be held liable for any loss or depreciation of the ward's funds. *In re* Adams' Guardianship, 169 Miss. 20, 24, 152 So. 836, 837 (1934) (guardian's failure to act upon warning that bank was in failing condition and that the depositor's guaranty law was suspended resulted in making guardian liable for ward's funds lost upon bank failure). Even though a guardian's appointment has been rendered a nullity following revocation of his letters of guardianship, a guardian can be held liable for losses resulting from his mismanagement of the ward's estate. Earle v. Crum, 42 Miss. 165, 167 (1868) (objection to court order requiring improperly appointed guardian to file a final accounting); *see* note 76 *supra.*

[90] MISS. CODE ANN. § 93-13-38 (Supp. 1980). Section § 93-13-27 further provides that all suits on behalf of a ward for whom a guardian has been appointed shall be brought in the name of the guardian and such suits may be commenced only after authority has been granted by court decree.

[91] Provisions of the law relating to the probate and registration of claims by administrators and executors also apply to guardians. *Id.* § 93-13-38. Section § 91-7-155 makes it the duty of an administrator or executor to pay a solvent estate's probated claim.

[92] *Id.* § 93-13-38.

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[93] The guardian may present a petition to the court for the proposed sale of the ward's land. If, at the hearing, the court is satisfied that the proposed sale will be beneficial to the ward, it may decree a sale and prescribe its conditions. *Id.* § 93-13-51. The court can order the sale or lease of the ward's property only for purposes specified or intended by statute, and it is the duty of the chancery court to see that the price is fair and reasonable. Thompson Funeral Home v. Thompson, 249 Miss. 472, 478, 162 So. 2d 874, 876 (1964) (chancery court had no authority to authorize sale by guardian of ward's estate where purchase price had to be determined by *privately* appointed appraisers).

[94] The sale of the ward's land must be reported to the court at the first term after the sale is made. Hoel v. Coursery, 26 Miss. 511, 520 (1853) (suit to enjoin ejectment).

[95] MISS. CODE ANN. § 11-5-117 (1972); *id.* § 93-13-51 (Supp. 1980).

[96] The guardian must petition the court for authority to sell the ward's real property, and summons is issued pursuant to § 93-13-281. *See* note 50 *supra*. If those persons enumerated in MISS. CODE ANN. § 93-13-281 (Supp. 1980) join in the petition, only an *ex parte* proceeding is necessary. *Id.* § 93-13-51. Generally, two adult next of kin must be made defendants, so that persons who should be concerned with the ward's welfare can be informed of the plans for the ward's property and be in a position to object to the sale should they so desire. Schrader v. Texas Co., 211 Miss. 214, 232, 51 So. 2d 460, 466 (1951) (sale of ward's mineral interests by guardian upheld despite failure to serve summons on adult next of kin, since the adults appeared and filed answers to guardian's petitions); *cf.* Temple v. Hammocke, 52 Miss. 360, 366 (1876) (requiring three next of kin as defendants). *But see* Fitzpatrick v. Beal, 62 Miss. 244, 249 (1884) (requiring no notice to next of kin when, due to insufficiency of personal estate, sale is necessary for ward's maintenance and education). The court may also order that any real or personal property of the ward be sold and the money reinvested in a prescribed manner if to do so would be advantageous to the ward. MISS. CODE. ANN. § 93-13-45 (1972).

Additionally, § 93-13-281 provides that if there are no adult relations within the third degree as calculated by the civil law method, the court may designate a guardian *ad litem* to answer the petition on behalf of the ward.

The court may allow the sale of a ward's property that is owned jointly with an adult who is selling his interest, if the buyer would also like to buy the ward's interest. The ward's interest, however, must have a fair market value of less than $2,000. Further, the price that the ward receives must be no less than the same proportionate price received by the adult co-owner, and no part of the cost of the proceedings may be charged to the ward. *Id.* § 93-13-217. Section § 93-13-53 gives the court authority to order the sale of the ward's personal property.

[97] MISS. CODE ANN. § 93-13-51 (Supp. 1980).

[98] Vanderburg v. Williamson, 52 Miss. 233, 235 (1876) (suit to recover land improperly sold by guardian).

A guardian may cultivate or lease his ward's real property[102] and may also lease the oil, gas, and mineral rights to the ward's property when to do so is in the ward's best interest.[103] The guardian can also use funds of the ward to improve the ward's land, if the court authorizes the expenditure.[104] Further, if in the ward's best interest, the court can approve extensions or renewals of encumbrances on the ward's property, and may allow further encumbrances in order to make necessary repairs to the property.[105]

A guardian must ask for the court's direction in investing the ward's money which is not needed for current expenditures or which he has not been directed to invest.[106] Also, although the guardian is not liable for loans made at the court's direction, he must use sound judgment if investment is left to his discretion.[107] This request for direction is also applicable to the disposition of securities or other investments that the ward receives by inheritance, gift, or bequest, and which the guardian is not authorized to invest.[108] In no instance, however, may the ward's funds be invested in a manner which is not specifically allowed by statute.[109]

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[99] Rule v. Broach, 58 Miss. 552, 555 (1880) (action for ejectment from lands sold pursuant to decree authorizing guardian to sell land for taxes).

[100] Handy v. Noonan, 51 Miss. 166, 169-70 (1885) (purchasers at void sale of ward's land sued to remove ward's claim as a cloud on their title); Parmele v. McGinty, 52 Miss. 475, 484 (1875) (suit to cancel guardian's sale of ward's land under void decree).

[101] Brockett v. Richardson, 61 Miss. 766, 781 (1884) (suit attacking validity of purchase of ward's land by guardian); *see* Scott v. Freeland, 15 Miss. (7 S. & M.) 409, 418 (1846) (wards' suit to set aside purchase of their land by their guardian). Unreasonable delay in objecting to the sale by the ward is considered an implied ratification. *Id.* at 419. The sale of the ward's land can always be set aside if the sale was fraudulent, and an element of such fraud is gross inadequacy of consideration. Corley v. Myers, 198 Miss. 380, 394, 22 So. 2d 234, 236 (1945) (appeal from decree setting aside mineral lease executed by guardian).

[102] The property can be leased for not more than three years, and the lease cannot extend beyond the date upon which the ward reaches majority. With court approval, the land can be leased for up to six years if it is advantageous to the ward but, again, the lease cannot extend beyond the date that the ward reaches majority. MISS. CODE ANN. § 93-13-41 (Supp. 1980).

[103] The guardian must petition the court for authority to lease the oil, gas and mineral rights, and summons is issued pursuant to § 93-13-281. *See* note 50 *supra.* If the next of kin join in the petition, no notice is required and an *ex parte* hearing is held. MISS. CODE ANN. § 93-13-43 (Supp. 1980).

[104] MISS. CODE ANN. § 93-13-45 (1972).

[105] *Id.* § 93-13-47.

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[106] Brewer v. Herron, 171 Miss. 435, 439, 157 So. 522, 523 (1934) (suit to recover unauthorized loan of ward's funds). Without prior court approval, the guardian has no authority to invest the ward's funds, and is liable for any unsecured loss. *Id.*, 157 So. at 523. *But cf. In re* Adams' Guardianship, 169 Miss. 20, 25, 152 So. 836, 837 (1934) (guardian not liable for loss of funds temporarily deposited while awaiting court approval of permanent disposition).

[107] Miss. Code Ann. § 93-13-57 (1972). A prudent guardian, acting under court authority, is not liable for losses attributable to normal business risks. Dorsey v. Murphy, 188 Miss. 291, 309, 194 So. 603, 607 (1940) (suit against guardian for ward's losses due to bank failure). A guardian may be held liable, however, when he has reason to believe that the loss will occur, yet does nothing. *In re* Adams' Guardianship, 169 Miss. 20, 24, 152 So. 836, 837 (1934).

[108] Miss. Code Ann. § 93-13-55 (1972). The court will decide whether the guardian should retain the securities or investments or sell them and reinvest the proceeds. If the court directs retention of the security, the guardian is not liable for the future sufficiency of the investment. *Id.*

[109] Davis v. Harris, 21 Miss. (13 S. & M.) 9, 10-11 (1849) (judgment holding void a conveyance to ward in consideration for funds used by guardian). The court may direct that the ward's funds be invested in state, county, municipal, United States or levee board bonds, in shares of savings and loan associations, and in certain trust notes or in common notes. Miss. Code Ann. § 93-13-57 (1972). The guardian can make no profit from use of the ward's funds. Wood v. Stafford, 50 Miss. 370, 373 (1874) (suit to recover land bought by guardian's spouse with ward's funds).

If the court approves, a guardian may use the ward's funds or borrowed funds to purchase land for a home for the ward or his family. Miss. Code Ann. § 93-13-38 (Supp. 1980). If in the ward's best interest, the court may grant the guardian's petition to buy land for the ward with surplus funds. The court may also authorize the completion of payment for land inherited by the ward or decree that the ward's unpaid portion be sold. If payment is approved, the sale of real or personal property may be authorized if necessary to make the payment. *Id.* § 93-13-49 (1972). Under no circumstances may a guardian use the ward's estate to buy real property without court approval. Gully v. Dunlap, 24 Miss. 410, 411 (1852) (suit by guardian's creditors to satisfy claim with property bought with ward's funds).

Historically, the chancery court has had no power to authorize an investment; therefore, a guardian could not invest the ward's funds in speculative corporate stocks, Carlisle v. Love, 170 Miss. 621, 637, 155 So. 197, 202 (1934) (suit to collect par value of stock from guardian), in a partnership, Shemper v. Hancock Bank, 206 Miss. 775, 778, 40 So.

A guardian cannot reap any benefit from the use of the ward's money,[110] and he is forbidden by statute to loan the money to certain individuals.[111] Failure to comply with the provisions governing investment of the ward's funds[112] renders the guardian liable for the amount of the funds plus interest.[113] Although only simple interest may be charged in cases of negligence, compound interest can be charged in cases of fraud or intentional misconduct.[114]

A guardian has a duty to use the income or corpus of the ward's estate as is necessary for the comfortable maintenance and support of the ward and his family[115] but, before this can be done, the guardian must obtain a court order fixing the amount.[116] While the chancery court may give retrospective ap-

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2d 742, 744 (1949) (suit to collect note on partnership in which ward's funds were invested), or bind the ward's funds as surety for another, McGavock v. Whitfield, 45 Miss. 452, 460 (1871) (suit for collection of promissory note with ward's estate as collateral). Also, a guardian could not invest the ward's funds in insurance policies. *In re* Guardianship of Horne, 178 Miss. 714, 724, 173 So. 660, 661 (1937) (suit to recover funds invested in insurance with court's approval). *Contra,* notes 123 through 125 and accompanying text *infra.* The above limitations on investments seem to have been negated, however, by Miss. Code Ann. § 91-13-1, -3 (1972). A guardian can acquire and retain any real, personal or mixed property and every kind of investment as long as he acts prudently, *id.* § 91-13-3, unless prohibited from, or directed to, a particular form of investment by deed, will or trust instrument or other person creating the guardianship, *id.* § 91-13-1.

[110] Gully v. Dunlap, 24 Miss. 410, 411 (1852).

[111] The guardian cannot borrow, or use for his own benefit, the funds or property of the ward. Neither can the guardian loan the estate's property or funds to any parent, brother, sister, son or daughter of the ward, or to himself, or to any attorney or agent representing him or the ward. These loans cannot be approved by the court. Miss. Code Ann. § 91-7-253 (Supp. 1980).

[112] *See* notes 106 through 111 and accompanying text *supra.*

[113] Dorsey v. Murphy, 188 Miss. 291, 310, 194 So. 603, 607 (1940) (suit to recover funds improperly invested by guardian). The guardian may be charged eight percent interest on money that is not needed or allowed for expenditures, if these funds are not reported to the court for an order of disposition. Miss. Code Ann. § 93-13-57 (1972).

[114] Jones v. Parker, 216 Miss. 64, 71-72, 61 So. 2d 681, 683 (1952) (contesting guardian's final account). Conversion of the ward's funds by the guardian amounts to a simple debt, for which simple interest is authorized. *Id.* at 71, 61 So. 2d at 683. *But see* Crump v. Gerock, 40 Miss. 765, 773 (1866) (guardian liable for compound interest where he makes a large profit from ward's funds).

[115] Miss. Code Ann. § 93-13-38 (Supp. 1980). The ward's family includes the "husband or wife and children; if there be no husband, wife, or children, the father and mother; and if there be no father or mother, then the grandfather and grandmother, sisters and brothers of said ward." *Id.*

[116] *Id.* A guardian may not spend more than the income of the ward's estate for the

proval to expenditures made from income without a prior order,[117] it is powerless, except in extreme circumstances,[118] to approve unauthorized expenditures from corpus.[119] If one or both of the ward's parents are alive, however, the court will determine if the parent or parents, rather than the ward's estate, should bear the expense of maintaining and educating the ward.[120]

The chancery court can empower a guardian to sell or compromise his ward's claims if to do so is in the ward's best interest.[121] Before a compromise can be effective, however, there

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ward's support and education, unless the court gives prior authorization. The court may authorize the sale of the ward's personal and real property to raise the difference between the income of the estate and the amount authorized to be spent. If in the ward's best interest, the court may order the real property sold before the personal property. *Id.* § 93-13-35 (1972).

[117] Brown v. Mullins, 24 Miss. 204, 205 (1852) (suit by ward to compel guardian to file a final account). *But see* Welch v. Childers, 195 Miss. 415, 420, 15 So. 2d 690, 691 (1943) (requiring prior court authorization of all expenditures by guardian for ward's maintenance and education). The amount of income to be spent for the ward's maintenance and education is left to the guardian's discretion as long as he acts reasonably. A guardian should, therefore, ask prior court approval of all expenditures in order to protect himself from a future disallowance of the expenditures as having been unreasonable. Neville v. Guardianship of Kelso, 247 So. 2d 828, 834-35 (Miss. 1971) (suit by successor guardians contesting expenditures by prior guardian).

[118] The court can approve an unauthorized expenditure from corpus where life and death are involved and there is no time for prior court approval. Williams v. Bonner, 79 Miss. 664, 668, 31 So. 207, 208 (1902) (suit by doctor to recover amount due for emergency treatment of ward). *But see* Deposit Guar. Bank & Trust Co. v. Mangum, 172 Miss. 443, 449-50, 160 So. 386, 387 (1935) (holding that expenses must be necessary and an emergency must exist, otherwise these expenses are unauthorized). The *Williams* court held that an unauthorized expenditure from corpus can also be ratified if the court would have approved the expenditure had it foreseen the event which created the expense. 79 Miss. at 668, 31 So. at 208.

[119] *See, e.g.,* Neville v. Guardianship of Kelso, 247 So. 2d 828, 832 (Miss. 1971) (chancery court without power to approve and ratify expenditures for corpus by a guardian without prior order); Boyd v. Hawkins, 60 Miss. 277, 281 (1882) (court has no authority to approve any unauthorized expenditures from corpus).

[120] MISS. CODE ANN. § 93-13-37 (1972). The purpose of this statute is to require parents who are able to support their minor children to do so without regard to any estate the child may have. Neville v. Guardianship of Kelso, 247 So. 2d 828, 832 (Miss. 1971). A guardian must therefore obtain a prior court order authorizing expenditures for the maintenance of a ward who has living parents. Darter v. Speirs, 61 Miss. 148, 149-50 (1883) (guardian's unauthorized expenditures for wards whose mother was destitute).

[121] MISS. CODE ANN. § 93-13-59 (1972). The guardian is authorized to accept real or personal property in satisfaction of the claim if in the ward's best interest. The law that applies to the compromise of claims by executors and administrators also applies to guardians. *Id.* The court can authorize an executor or administrator to sell or compro-

must be a hearing at which the interests of the ward are properly represented.[122] A guardian also may be authorized by the court to use the ward's funds to pay premiums for insurance policies issued during the lifetime of the ward's parents if continuance of the policies is warranted.[123] The guardian of a minor under fifteen years of age[124] may contract for life insurance either for the ward's benefit on the life of any person from whom the ward is to receive an inheritance, or on the ward's life for the benefit of anyone who has an insurable interest in his life.[125]

There is a presumption of undue influence in any transaction between a ward and his guardian. Such a transaction is prima facie void,[126] but can be ratified by the ward when he reaches majority if he has full knowledge of all relevant facts and is free from the guardian's influence.[127]

During the ward's lifetime, the guardian may elect to renounce a will that names the ward as a beneficiary, if court approval is first obtained.[128] In Mississippi, there is no authority that supports the right of a guardian to make gifts from his

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mise any claim that cannot be readily collected, but the order of authorization cannot be made until six months after the granting of letters. *Id.* § 91-7-229.

[122] Union Chevrolet Co. v. Arrington, 162 Miss. 816, 827, 138 So. 593, 595 (1932) (suit contesting validity of compromise of wrongful death claim made without court approval).

[123] Miss. Code Ann. § 93-13-39 (1972). During the lifetime of the ward, the guardian may be authorized to change the beneficiary of insurance policies on the life of the ward. No such action can be authorized, however, after the ward dies. South v. United States, 262 F. Supp. 321, 324 (N.D. Miss. 1966) (guardian sought to change beneficiary of deceased ward's life insurance).

[124] Minors 15 years of age or older can contract for insurance without a guardian's approval. Miss. Code Ann. § 83-7-19 (1972).

[125] *Id.*

[126] Meek v. Thornton, 36 Miss. 190, 252 (1858) (will made by ward naming guardian as principle beneficiary).

[127] Brandau v. Greer, 95 Miss. 100, 103-04, 48 So. 519, 520 (1909) (suit to compel cancellation of foreclosure sale of ward's property). The ward must also have full knowledge of all relevant law. *Id.*, 48 So. at 520.

[128] Estate of Mullins v. Estate of Mullins, 239 Miss. 751, 756, 125 So. 2d 93, 95 (1960) (administrator of husband's estate sought to renounce will of husband's deceased spouse). The court may authorize the renunciation of a will after the statutory period for renunciation ends if the ward for whom renunciation is sought had no guardian during the statutory period. Wolcott v. Wolcott, 184 So. 2d 381, 383-84 (Miss. 1966) (suit by guardian of incompetent widow to renounce deceased husband's will after expiration of statutory period).

ward's estate for estate planning purposes. However, other states have allowed such gifts to be made by statute,[129] by implication,[130] or under the doctrine of substituted judgment.[131]

C. *Ward's Rights and Liabilities*

A ward is incapable of making an express contract,[132] but a contract will be implied by law for his necessities, and the court will authorize payment from his estate.[133] In addition, the estate of a ward who undergoes court-approved emergency medical treatment can be held liable for the expense involved.[134] Also, during lucid intervals, an incompetent ward can execute a valid will.[135]

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[129] *See* MASS. GEN. LAWS ANN. ch. 201, § 38 (West Supp. 1981) (guardian may apply proceeds from sale of ward's estate toward making of gifts, among other things, in ward's behalf).

[130] *See, e.g., In re* Trott, 118 N.J. Super. 436, 288 A.2d 303, 305 (Super. Ct. App. Div. 1972) (chancery court, acting in role of protector of all incompetents, can authorize gifts for estate planning purposes); *In re* Morris, 111 N.H. 287, 281 A.2d 156, 158 (1971) (statute requiring guardian to improve ward's estate without waste implies right to make gifts for estate planning purposes).

[131] *See, e.g., In re* Guardianship of Christiansen, 248 Cal. App. 2d 398, 56 Cal. Rptr. 505, 511-14 (1967) (guardian seeking authority to make gifts of part of incompetent's property to reduce estate taxes); *In re* du Pont, 41 Del. Ch. 300, 194 A.2d 309, 316-17 (1963) (petition by guardians of incompetent to make substantial gifts to save estate taxes); In re Guardianship of Bohac, 380 So. 2d 550, 553 (Fla. Dist. Ct. App. 1980) (petition to make gifts to beneficiaries of incompetent's will to save estate taxes); *In re* Turner, 61 Misc. 2d 153, 305 N.Y.S. 2d 387, 389 (Sup. Ct. 1969) (denying authority to make gifts for estate planning purposes as gifts contradicted incompetent's intention). *But see In re* Guardianship of Estate of Neal, 406 S.W.2d 496, 502 (Tex. Civ. App. 1966) (finding no legislative authority for use of substituted judgment doctrine). Under the doctrine of substituted judgment, the primary consideration is what would probably have been done by the incompetent if he were under no disability. *See, e.g., In re* du Pont, 41 Del. Ch. 300, 194 A.2d 309, 317 (1963) (incompetent ward would probably not have made gifts of stock to family members); *In re* Guardianship of Bohac, 380 So. 2d 550, 553 (Fla. Dist. Ct. App. 1980) (refusing to approve gifts to only son whom ward had previously disinherited).

[132] Hines v. Potts, 56 Miss. 346, 350-51 (1879) (suit to recover funds paid by petitioner to discharge ward's debts). There is a rebuttable presumption that a person under a legal disability is incapable of making a contract, Deposit Guar. Bank & Trust Co. v. United States, 48 F. Supp. 369, 370-71 (S.D. Miss. 1943) (suit to recover disability payments under War Risk Insurance Act), and a rebuttable presumption that a person under no legal disability is capable of contracting. Hamilton Bros. Co. v. Narciese, 172 Miss. 24, 35, 158 So. 467, 470 (1935) (attacking validity of release allegedly made while injured party was incompetent).

[133] The court will authorize payment from the ward's estate for necessities, Bryant v. Stringer, 183 So. 2d 895, 898 (Miss. 1966) (daughter claimed compensation for services rendered to father prior to his death), which include wants of the ward "that are personal to body and mind . . . ." McCully v. McCully, 175 Miss. 876, 882, 168 So. 608, 609 (1936) (disallowing claim for expenses in caring for deceased incompetent).

Under certain circumstances, payments for oil, gas and mineral leases may be made directly to a ward.[136] In addition, payment of ordinary debts that do not exceed $2000 may be made directly to the ward or to someone for the ward if the court first determines that the settlement is in the ward's best interest.[137]

All suits for or on behalf of a ward must be brought in the name of the ward's guardian, and court approval of the suit must be obtained before commencement.[138] Further, such suits must be filed by the guardian in accordance with the statute of limitations, for if the statute runs against a guardian who has legal title to a cause of action, the statute also runs against the ward, even though he is under a legal disability.[139] A ward cannot, however, sue[140] or be sued by his guardian while the guardian is in office.[141]

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[134] Miss. Code Ann. § 41-41-9 (1972). Emergency medical treatment can be authorized if a physician files a written statement advising that there is an immediate need for surgical or medical treatment. The judge or clerk of any court may consent to or order the procedure if the only person who can consent on behalf of the incompetent refuses to do so, and some instrument invoking the aid of the court has been filed. The reasonable expense of the treatment is paid either by the incompetent or by one lawfully charged with payment of his necessities. If they are unable to pay, the county of residence of the person receiving the treatment does so. *Id.*

[135] *See* note 188 and accompanying text *infra.*

[136] Payment of a delay rental under an oil or gas or an oil, gas, and mineral lease which does not exceed $50 can be paid directly to a ward who is over 12 years old and has no duly appointed guardian of his estate. Payment by this method relieves the debtor of liability. Miss. Code Ann. § 93-13-213 (Supp. 1980).

A maximum of $250 as accrued or impounded runs of production or royalties under an oil, gas, and mineral lease may be paid directly to a ward who has no duly appointed guardian. *Id.* § 93-13-215. Payments may also be made on a monthly basis or other basis not to exceed the equivalent of $25 per month. *Id.*

[137] *Id.* § 93-13-21. This payment relieves the debtor of any further liability. *Id.*

[138] *Id.* § 93-13-27. A certified copy of the order authorizing the suit must be attached to the instrument commencing the suit. *Id.*

[139] *Id.* § 15-1-53 (1972).

[140] Davis v. Davis, 135 Miss. 214, 223-24, 99 So. 673, 673 (1924) (suit to attach ward's land to satisfy debt owed guardian); United States Fidelity & Guar. Co. v. Jackson, 111 Miss. 752, 755, 72 So. 150, 151 (1916) (suit by ward to recover funds deposited by guardian in bank that failed).

A minor ward must bring suit against his guardian and the sureties on the guardian's bond within five years of the ward's attaining 21 years of age. Miss. Code Ann. § 15-1-27 (1972).

In suits against a ward, process must be served on both the ward and his guardian,[142] but the guardian may waive service of process in civil actions.[143] A judgment rendered against a ward who is not properly represented is voidable.[144] Further, a suit against a guardian on a cause of action against the ward must be brought within four years after the guardian qualifies.[145]

D. *Annual Accounts and Inventory*

A guardian must give the court an inventory of all the ward's real and personal property within three months of his appointment.[146] Inventories of property subsequently received and of any increase in the estate must also be submitted to the court.[147] Failure to submit an inventory is a ground for removal of the guardian and suit on his bond.[148]

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[141] Davis v. Davis, 135 Miss. 214, 223-24, 99 So. 673, 673 (1924).

[142] MISS. CODE ANN. § 13-3-45 (1972). If both the ward and the guardian are not served before the statute of limitations runs, the suit is barred. Potts v. Hines, 57 Miss. 735, 737 (1880) (complaint not amended to make both guardian and ward defendants until after statute of limitations had run).

If the defendant is an inmate of a mental institution, service of process on the defendant is not necessary if the institution's director or superintendent certifies that the defendant is mentally incapable of responding to process. MISS. CODE ANN. § 13-3-45 (1972).

[143] MISS. CODE ANN. § 13-3-71 (1972). The waiver must be written and executed after the suit is filed. *Id.*

[144] Sherwood v. Pearl River Valley Water Supply Dist., 301 F. Supp. 61, 63 (S.D. Miss. 1969) (action by deceased's administrator challenging taking of deceased's property), *aff'd per curiam,* 427 F.2d 717 (5th Cir.), *cert. denied,* 400 U.S. 832 (1970); Scott v. United States, 190 F.2d 134, 137 (5th Cir. 1951) (suit claiming service of process did not meet statutory requirement). Citing *Scott,* the *Sherwood* court found that a judgment rendered against a ward who was not properly represented is good until set aside by direct attack. Even then, the judgment will not be set aside unless, in addition to lack of representation, a meritorious defense is prima facie shown. 301 F. Supp. at 63. *Cf.* Sledge v. Boone, 57 Miss. 222, 225 (1879) (infant may attack an improper decree by an original bill). *Contra* Bailey v. Fitz-Gerald, 56 Miss. 578, 584 (1879) (holding as void a decree issued where ward not properly represented).

[145] MISS. CODE ANN. § 15-1-25 (1972). It is important that the suit be brought while all the evidence can be found. First Nat'l Bank & Trust Co. v. Landau, 183 Miss. 651, 657, 184 So. 618, 619 (1938) (appeal from decree holding that claim against incompetent's estate was not barred by statute of limitations).

[146] MISS. CODE ANN. § 97-13-33 (1972). The inventory must include any debt owed to the ward by the guardian which arose prior to his being appointed. Neill v. Neill, 31 Miss. 36, 41 (1856) (suit to compel guardian to include debt owed to ward in inventory).

[147] MISS. CODE ANN. § 97-13-33 (1972). A guardian exceeds his duty by collecting the

At least once each year a guardian must file an account[149] of the ward's estate showing receipts of money,[150] products of the estate, sales or other dispositions, and each item of expense for the ward's maintenance and education and for the preservation and management of the estate.[151] The chancery court can require more than one accounting yearly or, in certain situations, dispense with all but the final account.[152] A guardian may be removed for failure to submit a required account[153] or may be held personally liable for accounts that do not clearly identify the ward's assets and liabilities.[154] Although a guardian's accounts are prima facie correct,[155] they can be reopened by the

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money of the ward in another state. If such money is collected, however, it must be included in the inventory of the ward's estate and the guardian is liable for it. Martin v. Stevens, 30 Miss. 159, 160-61 (1855) (suit for accounting and return of money collected by guardian in South Carolina). Neither is the guardian entitled to compensation for services rendered in collecting money or property out of state. Maxwell v. Harkleroad, 77 Miss. 456, 462, 27 So. 990, 992 (1900) (suit by ward contesting guardian's compensation).

[148] MISS. CODE ANN. § 93-13-33 (1972).

[149] The accounts of each of a guardian's several wards must be kept separately, but may be combined in court orders and decrees concerning the accounts if to do so is practical. *Id.* § 93-13-69.

The annual accounts are required so the court may protect the financial interest of the ward. Reynolds v. Walker, 29 Miss. 250, 268 (1855) (suit contesting guardian's final account).

[150] The guardian appears as the ward's debtor in the annual account, to the extent of the funds received for the ward by the guardian. Roach v. Jelks, 40 Miss. 754, 756 (1866) (appeal from decree ordering money received by the guardian to be excluded from final account); Reynolds v. Walker, 29 Miss. 250, 266 (1855) (suit contesting guardian's final account).

[151] MISS. CODE ANN. § 93-13-67 (Supp. 1980).

[152] *Id.* If the funds and personal property of the ward do not exceed $3000, and there is no prospect of further receipt other than interest, or if funds on hand or to be received are from the welfare department, the court may dispense with all but the final account. *Id.*

[153] United States Fidelity & Guar. Co. v. Jackson, 111 Miss. 752, 755, 72 So. 150, 151 (1916) (suit to recover funds deposited by guardian in bank that failed); Reynolds v. Walker, 29 Miss. 250, 265 (1855) (suit contesting guardian's final account).

[154] Adams v. Westbrook, 41 Miss. 385, 403-04 (1867) (suit by ward claiming guardian misused ward's funds). In a proper case, errors in the guardian's accounts due to negligence may be corrected. McFarlane v. Randle, 41 Miss. 411, 428 (1867) (taking exception to guardian's accounting for ward's money in Confederate currency).

[155] Heard v. Daniel, 26 Miss. 451, 453 (1853) (suit to compel guardian to make final account).

ward and proved to be incorrect.[156]

Each expense stated in a guardian's account must be accompanied by a voucher[157] in order for it to have probative value.[158] A voucher will not be allowed unless it conforms to, or can be made to conform to, the statutory voucher requirements for executors and administrators.[159]

A guardian is entitled to a credit in his annual and final[160] accounts for attorney's fees paid or allowed in the management of or on behalf of the estate if the court deems the services proper and rendered in good faith.[161] If the guardian also acts as the ward's attorney, the court may allow him reasonable compensation in his capacity as attorney, in lieu of his compensation as guardian.[162]

IV. TERMINATING GUARDIANSHIPS

A. Nonresidents and Removal of Ward or Property

The chancery court of the county of an adult incompetent's residence has the authority to appoint a guardian for the incompetent even though a guardian has been properly appointed in another state.[163] The guardian of a nonresident ward who is appointed in the ward's state of residence is entitled to be substituted for a guardian appointed in Mississippi.[164] Further, a nonresident guardian who is appointed in the ward's state of residence may sue in Mississippi courts on behalf of the ward.[165]

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[156] Johnson v. Miller, 33 Miss. 553, 558 (1857) (objection to guardian's being allowed to correct accounts). The guardian has no right to reopen and falsify an account. *Id.*

[157] MISS. CODE ANN. § 93-13-67 (Supp. 1980).

[158] White v. Moore, 164 Miss. 272, 279, 144 So. 696, 698 (1932) (suit to compel guardian to file final account).

[159] MISS. CODE ANN. § 93-13-71 (1972). Every voucher must be written on or connected to at least one-half of a sheet of legal size paper or may be an ordinary bank check. Each voucher must give the name and number of the appropriate case and must be filed with the clerk. *Id.* § 91-7-279.

If the court requires a voucher to be produced even though one is not required by law, the guardian need only produce papers which substantiate each expenditure. The court may, in its discretion, require the records or copies of the records to be filed. *Id.* § 93-13-73.

[160] For an explanation of the guardian's final account, see notes 175 through 179 and accompanying text *infra.*

[161] *See* MISS. CODE ANN. § 91-7-281 (1972). This section, pertaining to attorney's fees for the estates of deceased persons, is made applicable to guardians by § 93-13-79.

Attorney's fees incurred in the management of a guardianship are personal obligations of the guardian and not obligations of the estate of the ward. A guardian may be allowed attorney's fees in managing the estate by petitioning the court, but the attorney cannot directly petition the court for fees due. Hutton v. Gwin, 188 Miss. 763, 770, 195 So. 486, 488 (1940) (suit by attorney for recovery for services rendered in connection with guardianship).

[162] MISS. CODE ANN. § 91-7-281 (1972).

Under certain conditions, a guardian can be allowed to take the ward and the ward's personal property to another county[166] or state.[167] If it appears that the guardian, without authority, is about to take the ward's property from the state, the sheriff can be ordered to seize the property.[168] Finally, the court can allow a nonresident guardian to remove a nonresident ward's personal property from the state.[169]

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[163] *Id.* § 93-13-121 (Supp. 1980). The petition for appointment is filed by the incompetent or his guardian in the chancery clerk's office in the incompetent's county of residence. Process is served under § 93-13-281. *See* note 50 *supra.*

The court, or chancellor in vacation, examines the incompetent in person on return day and determines if the incompetent is able to manage his property. If not, the court will appoint a guardian for his estate. The guardian must file annual accounts as must other guardians. *Id.* § 93-13-121.

[164] *See, e.g.,* Washington Bank & Trust Co. v. Magee, 187 Miss. 198, 203, 192 So. 438, 438-39 (1939) (suit by Louisiana tutor to be substituted for Mississippi guardian of Louisiana ward); Moore v. Jones, 99 So. 437, 437 (Miss. 1924) (action between in-state and nonresident guardians to determine guardianship of ward). A nonresident guardian of a nonresident ward who has real or personal property in Mississippi is entitled to be appointed guardian in Mississippi by the chancery court of the county in which the property is owned. The nonresident guardian must present the original letters of guardianship or a certified copy to the court, and must post bond as do other guardians. Miss. Code Ann. § 93-13-181 (Supp. 1980). "Guardian" as used in this section of the Mississippi Code, and §§ 93-13-183, -185, includes all persons in other states or countries who "stand in the relation of guardian to such ward." *Id.* § 93-13-187.

[165] Miss. Code Ann. § 93-13-183 (1972). When a minor's state or country of residence vests administration of his estate in his parents while living, the parents may sue in Mississippi on the minor's behalf. The parents must first file a certificate from the judge or clerk of the court of the minor's residence stating that the minor and parent live within that court's jurisdiction. The certificate must be filed in the chancery clerk's office in the county in which the claim exists. *Id.* § 93-13-29. A Mississippi court has no authority to decree the sale of the ward's land that is located in another state. *See* Musson v. Fall Back Planting & Mercantile Co., 12 So. 587, 588 (Miss. 1891) (suit attacking validity of sale of Mississippi ward's land in Louisiana).

[166] Miss. Code Ann. § 93-13-61 (1972). The guardian can be appointed by the chancery court in the new county and released from his bond in the original county upon final settlement. *Id.*

[167] *Id.* § 93-13-63. The guardian must give bond with two Mississippi sureties in the full value of the ward's personal estate. The bond is conditioned on the guardian's qualifying as guardian in the state or country to which he is removing the property and ward. The guardian must also make final settlement of his guardianship accounts. *Id.* Because the purpose of requiring a court order for the removal of the ward and his property is "the civil protection of the person and property of the ward, and not for the purpose of making such removal an offense against the state," Hemphill v. State, 127 Miss. 805, 812,

B. *Guardian's Discharge and Termination of Guardianship*

A guardian may be removed by the court for sufficient cause[170] or he may resign.[171] Guardians may also be removed if the ward is restored to reason[172] or if the value of the estate of a minor or incompetent falls below $2000 and there is no prospect of further receipts.[173] Any guardianship, including the natural guardianship, terminates when the minor reaches the age of

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90 So. 488, 489 (1922) (appeal from guardian's kidnapping conviction), a guardian who takes his ward to another place of residence against the ward's will is not guilty of kidnapping.

[168] MISS. CODE ANN. § 93-13-65 (1972).

[169] *Id.* § 93-13-185. The court may, in its discretion, allow such removal after the guardian makes final settlement of the estate, and after the court approves bond in the amount of the full value of the property to be removed. The guardian must present to the court that appointed him a complete inventory of the ward's property that is being removed. Failure to do so renders the guardian liable on his bond. *Id.*

[170] *Id.* § 93-13-23. It is left to the court's discretion to determine what constitutes sufficient cause for removal. Conner v. Polk, 161 Miss. 24, 29, 133 So. 604, 605 (1931) (mother of ward petitioned to have guardian removed and herself appointed). A breach of a material condition of the letters of guardianship, Hosey v. Myers, 240 So. 2d 252, 252 (Miss 1970), and the conviction of the guardian of a felony, Hemphill v. Smith, 128 Miss. 586, 593, 91 So. 337, 338 (1922), have been held to be sufficient cause for the guardian's removal.

[171] MISS. CODE ANN. § 93-13-25 (1972). When the guardian dies, resigns, or is removed, the court may appoint another. *Id.* A guardian should resign when he has an interest adverse to his ward that affects his ability to be loyal. Liddel v. Strong, 183 Miss. 805, 814, 184 So. 432, 433 (1938) (ward's funds lost when bank at which guardian was cashier became insolvent).

[172] MISS. CODE ANN. § 93-13-133 (1972). If the ward has been restored to reason, the court may terminate the guardianship, allow the guardian reasonable compensation, and turn over the estate's property to the ward. This also applies if it appears that an adjudged drunkard or drug addict has been sufficiently reformed. *Id.* The chancery court of the county in which the guardian was appointed, or the chancellor in vacation, may hold a hearing to determine if the incompetent has been restored to reason. *Id.* § 93-13-151 (Supp. 1980).

[173] *Id.* § 93-13-75 (Supp. 1980). After final settlement, the court must have the power to have the property delivered to the ward or to some person or bank under specified conditions imposed by the court. The person receiving the property becomes liable to the court for the proper use of the money for the ward's benefit, but no security is required. *Id.*

twenty-one.[174] The court may, at its discretion, terminate the guardianship of any married minor who is over eighteen years of age.[175]

When a guardianship ends, the guardian must make a final settlement,[176] which consists of a statement of all balances of his annual accounts[177] and all other charges and amounts received.[178] In its decree approving the final settlement, the court can allow the guardian up to ten percent of the estate's value as a commission.[179] After the settlement is approved and the estate is delivered to the ward, the liability of the guardian and his surety ends.[180]

V. CONSERVATORS

A person who is mentally incapable of managing his estate,[181] or one or more friends of the incompetent, can petition the chancery court to appoint a conservator to do so.[182] After giving proper notice,[183] the chancellor conducts a hearing to determine the necessity of a conservator.[184] The estate of the alleged incompetent pays all costs if the petition is sustained, but the petitioner pays the costs if the petition is denied.[185]

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[174] *Id.* The chancery court cannot compel parents to support their adult children. Watkins v. Watkins, 337 So. 2d 723, 724 (Miss. 1976) (contempt proceeding not appropriate forum to determine divorced father's liability for support of retarded adult child).

[175] MISS. CODE ANN. § 93-13-75 (Supp. 1980).

[176] *Id.* § 93-13-77. Any ward, upon reaching 21 years of age, can petition to waive final settlement and to discharge the guardian and his sureties. The court will grant the petition unless there is reason to believe that the petition was procured by the guardian through fraud or undue influence. *Id.* The guardian must show that there was full disclosure of all relevant information, Gregory v. Orr, 61 Miss. 307, 310 (1883) (suit to compel guardian to show reason for failure to file annual accounts), and that he acted in good faith, Sullivan v. Blackwell, 28 Miss. 737, 742 (1855) (suit alleging that several of the guardian's annual accounts were improper).

[177] MISS. CODE ANN. § 93-13-77 (1972). *See* notes 149 through 156 and accompanying text *supra.*

[178] MISS. CODE ANN. § 93-13-77 (1972). The ward will be summoned to show why the final account should not be approved. *Id.* The only remaining authority of a guardian after the death of the ward is to submit a final account. South v. United States, 262 F. Supp. 321, 324 (N.D. Miss. 1966) (suit challenging right of guardian to change beneficiary of ward's insurance without authorization). If a guardian has not filed any required annual accounts, however, his final account will not be allowed. Welch v. Childers, 195 Miss. 415, 419-20, 15 So. 2d 690, 691 (1943).

[179] MISS. CODE ANN. § 93-13-77 (1972). The guardian is entitled to a commission for all funds that he collects or disburses. Maxwell v. Harkleroad, 77 Miss. 456, 461, 27 So. 990, 991 (1900) (suit challenging commission awarded to guardian). When a guardian has initially asked for no commission because of a settlement with the ward, and this settlement is later set aside, the court can allow the guardian his proper commission. Hudson v. Strickland, 58 Miss. 186, 193 (1880) (suit objecting to commission allowed guardian).

[180] MISS. CODE ANN. § 93-13-77 (1972).

[181] *See* notes 9 through 11 and accompanying text *supra.*

A conservator has the same rights, duties, and liabilities as a minor's guardian and is subject to all laws relative to the guardianship of a minor.[186] An incompetent placed under a conservatorship is limited in his power to contract to the same extent as a ward.[187] The assets of the incompetent's estate provide for support and maintenance of the incompetent's dependents.[188]

A conservator may resign or be discharged in the same manner as a minor's guardian and may be discharged if the conservatorship becomes unnecessary.[189] Also, the chancery court can terminate the conservatorship if the incompetent is found to have been restored to reason.[190]

VI. SUGGESTED CHANGES

By allowing all guardians to assume total control over the ward or his estate,[191] Mississippi's guardianship statutes assume that all wards are totally disabled. This assumption is unrealistic because there are different degrees of disability. For example, there are varying degrees of mental retardation requiring varying amounts of supervision and care.[192] To remedy this situation, several states recently have adopted statutes that allow appointment of limited guardians.[193]

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[182] MISS. CODE ANN. § 93-13-251 (1972). The court, in its discretion, can also direct the conservator to take charge of the incompetent. *Id.*

[183] After the petition is filed, the chancery clerk sets a time and place for a hearing, giving at least five days notice to the alleged incompetent, though less notice can be given for good cause. Notice must also be given to the alleged incompetent's spouse or one next of kin, provided the person is a Mississippi resident. If the person to be notified is the petitioner, he must be notified even if he is not a Mississippi resident. Personal service must be given to the one relative and to the alleged incompetent. If the alleged incompetent is entitled to any benefit or income from the Veteran's Administration, the VA must be given notice by personal service. *Id.* § 93-13-253.

[184] *Id.* § 93-13-255. A guardian *ad litem* may be appointed at the court's discretion to represent the alleged incompetent at the hearing. At least two competent physicians, with a minimum of three years actual practice each, must examine the alleged incompetent and must file with the chancery clerk a written report of the examination. *Id.*

[185] *Id.* § 93-13-257.

[186] *Id.* § 93-13-259.

[187] *Id.* § 93-13-261. One whose property is under a conservatorship can execute a valid will during lucid intervals. Lee v. Lee, 337 So. 2d 713, 715 (Miss. 1976) (appeal from decree holding void a will executed by one under conservatorship).

[188] MISS. CODE ANN. § 93-13-263 (1972).

[189] *Id.* § 93-13-267.

[190] *Id.* § 93-13-265. For a further discussion of restoration to reason, see note 172 and accompanying text *supra.*

A limited guardianship allows the court to impose only those limitations on the disabled person as are necessary for his protection and assistance.[194] Kentucky requires that a jury determine whether a disability exists and, if so, the nature and extent of the disability.[195] The State of Washington requires the court, sometimes with the aid of certain state agencies, to investigate the nature and extent of the disability.[196] After this initial determination, both states allow the disabled person to retain all rights which he has been found to be capable of exercising without assistance.[197]

Mississippi's guardianship statutes, as they currently exist, are clearly antiquated and should be amended to incorporate the limited guardianship concept. Limited guardianships should, however, be available only to adult incompetents, as the disability of minority renders a minor totally disabled, regardless of the existence or extent of other disabilities.[198]

The legislature should require that the petition for the adjudication of incompetency include findings regarding the nature and extent of the alleged disability.[199] The person alleged to be incompetent should then be evaluated by a team of three individuals who would submit their report to the court. This team should consist of a physician to examine the subject's physical condition, a social worker to examine the environment, adaptive behavior and social skills of the individual, and a third member with expertise to evaluate the individual's particular type or types of disability.[200] A state commission should be established to identify and maintain a list of individuals who are both qualified and willing to serve on the evaluation teams.[201]

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[191] *See* notes 6, 7 and accompanying text *supra.*

[192] The American Association on Mental Deficiency has established four categories of retardation based on I.Q. These categories are: mild retardation (55-70 I.Q.); moderate retardation (40-54 I.Q.); severe retardation (25-39 I.Q.); and profound retardation (I.Q. below 25). For a further discussion of these classifications, see Dussault, *Guardianship and Limited Guardianship in Washington State: Application for Mentally Retarded Citizens,* 13 GONZ. L. REV. 585, 592-95 (1978).

[193] *See, e.g.,* KY. REV. STAT. § 387.287 (1970) (authorizing appointment of limited committeeship for adults who are not totally disabled); WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981) (allowing appointment of limited guardian for any person who is not fully incompetent).

[194] *See* Dussault, *supra* note 192, at 605.

[195] KY. REV. STAT. § 203.022 (1970).

[196] WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981).

[197] KY. REV. STAT. § 387.287(3) (1970); WASH. REV. CODE ANN. § 11.88.010(2) (Supp. 1981).

[198] *See* note 2 and accompanying text *supra.*

After receiving the report of the evaluation team, the court should conduct a hearing, to be attended by all interested parties. The purpose of the hearing would be to determine whether a guardianship is warranted in light of the evaluation team's report and, if warranted, the extent of the protection and assistance that should be furnished the incompetent.[202] The court should then impose only those limitations which it finds necessary for the incompetent's protection and assistance.[203]

Following the appointment of a limited guardian, the court should be required to hold periodic hearings to assure that the guardianship continues only as long as is necessary. Such a hearing would also provide an opportunity to adjust the limitations imposed on the disabled person as his or her abilities change.[204]

A second change that should be made in Mississippi's guardianship statutes involves the ability of the guardian to make gifts from the ward's estate for estate planning purposes.[205] A person should not be forced to pay unnecessary estate taxes, against the best interests of his estate, simply because he happens to have been placed under a guardianship or conservatorship.[206] Mississippi should therefore statutorily allow a guardian to make gifts from a ward's estate for estate planning purposes as the ward would probably have done, if he had been competent.

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[199] *See* AMERICAN BAR ASSOCIATION, GUARDIANSHIP AND CONSERVATORSHIP 91 (1979).

[200] *See id.* at 82-83.

[201] *See id.* at 86.

[202] *See id.* at 94-95.

[203] *Id.* at 98.

[204] *Id.* at 101.

[205] *See* notes 129 through 131 and accompanying text *supra.*

[206] Strange v. Powers, 358 Mass. 126, 260 N.E.2d 704, 709 (1970) (conservator's peti-

These changes are necessary to update Mississippi's guardianship and conservatorship statutes and to protect more effectively the rights of the disabled. The legislature should therefore act as soon as possible to adopt the limited guardianship concept and to allow gifts from a disabled person's estate for estate planning purposes.

Gary E. Friedman

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tion to establish estate plan for ward to reduce estate tax liability by making annual lifetime gifts).

RECENT DECISIONS

SEVENTH AMENDMENT—JURY TRIALS—COMPLEXITY EXCEPTION REQUIRED BY PROCEDURAL DUE PROCESS PROVISIONS OF THE FIFTH AMENDMENT

Plaintiffs, American producers of consumer electronic products,[1] brought actions alleging that defendants, Japanese electronic products manufacturers,[2] had violated federal antitrust statutes.[3] Plaintiffs sought injunctive relief and compensatory and treble damages.[4] The cases were consolidated,[5] and during pretrial proceedings a group of defendants moved to strike plaintiffs' motion for a jury trial.[6] The United States District Court for the Eastern District of Pennsylvania denied the motion to strike.[7] The district court rejected defendants' contention that even though the seventh amendment guarantees a jury trial,[8] the due process clause of the fifth amendment[9] precludes trial by jury where the complexity of a lawsuit forestalls a competent jury verdict.[10] On appeal,[11] the Court of Appeals for the Third Circuit, *held,* vacated and remanded. The procedural due process provisions of the fifth amendment require an exception to the seventh amendment guarantee of a jury trial in a case which is too complex for a jury to decide properly. *In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069 (3d Cir. 1980).

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[1] Plaintiffs were American corporations which were current or former manufacturers of televisions, tape recorders, radios, and sound systems. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069, 1071-72 (3d Cir. 1980).

[2] Defendants exported many of their goods to the United States for sale. *Id.* at 1071-72.

[3] *Id.* at 1072. It was alleged that defendants had violated the 1916 Antidumping Act, 15 U.S.C. § 72 (1976), the Sherman Act, 15 U.S.C. §§ 1, 2 (1976), the Wilson Tariff Act, 15 U.S.C. § 8 (1976), the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), and the Clayton Act, 15 U.S.C. § 18 (1976). Plaintiffs charged that defendants, by artificially lowering prices on their products, had conspired to drive American television manufacturers from the American market. 631 F.2d at 1072.

[4] 631 F.2d at 1072. Plaintiffs sought to enjoin defendants from further improper conduct. Compensatory damages were sought pursuant to the Lanham Act, 15 U.S.C. § 1125 (1976), which prohibits false designations of the origins of manufactured goods. Treble damages were sought under the Antidumping Act and the Clayton Act. 631 F.2d at 1072.

[5] The suits were consolidated in the Eastern District of Pennsylvania for pretrial proceedings. *In re* Japanese Elec. Prods. Antitrust Litigation, 388 F. Supp. 565 (J.P.M.D.L. 1975). They were later consolidated for trial. *In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d at 1073.

[6] Zenith Radio Corp. v. Matsushita Elec. Indus. Corp., 478 F. Supp. 889, 897 (E.D. Pa. 1979), *rev'd sub nom. In re* Japanese Elec. Prods. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980). For various reasons, certain defendants did not join in the motion to strike. *Id.* The request for jury trial was made pursuant to FED. R. CIV. P. 38(b).

[7] 478 F. Supp. at 929.

The seventh amendment guarantees a jury trial in civil cases where the amount in controversy exceeds twenty dollars.[12] In determining the extent of the seventh amendment guarantee,[13] the Supreme Court traditionally has applied a test based on the common law of England as it existed when the amendment was adopted in 1791.[14] Under this test, if English law did not require a trial by jury, then none was required by the seventh amendment.[15]

In 1959, however, in *Beacon Theatres, Inc. v. Westover,*[16] the Court departed from strict application of its historical test.[17] The plaintiff in that case sought a declaratory judgment that contracts which gave plaintiff exclusive rights to show "first run" motion pictures did not violate the antitrust laws.[18] In addition, plaintiff sought to enjoin the defendant from instituting antitrust actions against it.[19] Defendant counterclaimed for treble damages, alleging that plaintiff was guilty of antitrust violations.[20] Thus, while the action originally was one in equity, it was broadened to include both legal and equitable claims.[21] Traditionally, any legal issues in such cases were resolved by the judge at the time he ruled on the equitable questions.[22] The Supreme Court, however, required the action to be tried to a jury.[23] The Court reasoned that a litigant should not be deprived of his right to a jury trial of his legal counterclaim simply because the plaintiff brought his suit in equity.[24] The Court's decision in *Beacon Theatres* turned on

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[8] U.S. CONST. amend. VII.

[9] U.S. CONST. amend. V. The amendment provides, in relevant part, that no person shall "be deprived of life, liberty, or property, without due process of law."

[10] 478 F. Supp. at 936-42.

[11] The district court certified its order for interlocutory appeal under 28 U.S.C. § 1292(b) (1976), which allows a district judge to order an appeal of a decision on a controlling question of law. 478 F. Supp. at 942-46.

[12] U.S. CONST. amend. VII. The amendment states: "In suits at common law, where the value in controversy exceeds twenty dollars, the right of trial by jury shall be preserved . . . ."

[13] The problem in interpreting the seventh amendment arises from its use of the word "preserved." Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Decision Making,* 70 NW. U.L. REV. 486, 486 (1975); *see* Wolfram, *The Constitutional History of the Seventh Amendment,* 57 MINN. L. REV. 639, 640 (1973) (term "preserved" requires interpretation).

[14] In Dimick v. Scheidt, 239 U.S. 474 (1935), the Supreme Court stated: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of common law established at the time of the adoption of that constitutional provision in 1791." *Id.* at 476.

[15] Wolfram, *supra* note 13, at 640; *see* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (1791 rules of English common law control); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (seventh amendment protects rights under the common law of England at the time of the amendment's adoption).

[16] 359 U.S. 500 (1959).

[17] *Id.* at 507-10. The historical test has been criticized for its uncertainty of application and effect on judicial administration. *See, e.g.,* Comment, *The Seventh Amendment and Complex Civil Litigation: The Demise of the Complexity Exception to Trial by*

Jury and the Search for a Viable Due Process Alternative, 50 MISS. L.J. 572, 576 (1979) (historical test's application uncertain and difficult); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment,* 81 YALE L.J. 112, 114 (1971) (historical test difficult to apply). Application of the historical test has been difficult because the line between law and equity jurisdiction was not definite at the time of the amendment's adoption. In fact, law frequently borrowed from equity, and equity from law. F. JAMES, CIVIL PROCEDURE 340-41 (1965); *see* Redish, *supra* note 13, at 487 (blind adherence to history would place modern judicial administration in historical strait jacket). Even when one knows whether the suit was tried in a law court or equity court, it is often difficult to determine the basis for jurisdiction. *Compare* Arnold, *A Historical Inquiry into the Right to Trial by Jury in Complex Civil Litigation,* 128 U. PA. L. REV. 829, 840-46 (1980) (equity jurisdiction based on inadequacy of common law remedy), *with* Campbell & LePoidevin, *Discussion: Complex Cases and Jury Trials: A Reply to Professor Arnold,* 128 U. PA. L. REV. 965, 974-85 (1980) (equity jurisdiction based on complexity of case).

[18] 359 U.S. at 502-03.

[19] *Id.* Plaintiff had been notified of defendant's intent to bring antitrust actions. Plaintiff contended that this notification, through coercion and duress, deprived it of the power to negotiate for exclusive first-run contracts. *Id.*

[20] *Id.*

[21] Plaintiff's demand for injunctive and declaratory relief traditionally would be heard in equity without a jury, Redish, *supra* note 13, at 491-92, while defendant's counterclaim raised legal issues traditionally tried to a jury. 359 U.S. at 504; *accord,* Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27, 29 (1916) (demand for treble damages is triable only in a court of law).

[22] F. JAMES, *supra* note 17, at 367. If the equitable and legal claims were not factually connected, the issues were tried separately. But where the claims arose from the same circumstances, all issues were decided by the judge in a single bench trial. *Id.* at 367-69; *see* Redish, *supra* note 13, at 492-93 (at common law the chancellor had discretion to order a jury trial of legal issues or to wait until the legal issues were resolved before trying the equitable issues).

[23] 359 U.S. at 508.

[24] *Id.* The Court reasoned that a litigant's right to a jury trial should not turn on the

what it termed the necessity of interpreting the seventh amendment in a modern context.[25] In the Court's view, if the claim was legal under the historical test,[26] or if adequate legal remedies had developed since 1791,[27] then the litigant had a constitutional right to a jury trial of his legal claim.[28]

Beacon Theatres was reaffirmed in *Dairy Queen, Inc. v. Wood,*[29] in which plaintiffs sought an accounting and money damages[30] in an action for breach of trademark agreements.[31] Ordering a jury trial,[32] the Court rejected the equitable "clean-up doctrine,"[33] under which legal issues are resolved by a court of equity without the aid of a jury.[34] The Court alluded to a complexity exception to the seventh amendment and noted that certain cases may involve issues too complex for a jury,[35] but concluded that *Dairy Queen* was not such a case.[36]

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outcome of a race to the courthouse. *Id.* at 504.

[25] The Court considered developments since the adoption of the seventh amendment in determining the extent of jury trial guarantees. It ruled that the existence of "inadequacy of remedy and irreparable harm . . . must be determined, not by precedents decided under discarded procedures, but in light of the remedies now made available . . . ." *Id.* at 507. *See* McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover,* 116 U. PA. L. REV. 1, 6-7 (1967) (decision recognizes that formerly inadequate legal remedies may have become adequate).

[26] *See* notes 14, 15 and accompanying text *supra.*

[27] The Federal Rules of Civil Procedure expanded the legal remedies available to litigants. 359 U.S. at 509-10; *accord,* Prudential Ins. Co. v. Saxe, 134 F.2d 16, 31-34 (D.D.C.) (federal rules allow for joinder of legal and equitable claims, and also for compulsory legal counterclaims in equitable matters), *cert. denied,* 319 U.S. 745 (1943).

[28] 359 U.S. at 509.

[29] 369 U.S. 469 (1962).

[30] *Id.* at 475, 479. Equity dealt with claims for collection of a debt or for monetary compensation with an action for an accounting. Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 COLUM. L. REV. 43, 65 (1980). The accounting was exclusively an equitable remedy. 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF THE ENGLISH LAW 221-22 (2d ed. 1899); J. WILSON, THE WORKS OF JAMES WILSON 145 (1896) (accountings were never tried to a jury).

[31] 369 U.S. at 473-74. Plaintiff claimed that defendant had defaulted on payments due under a contract which licensed the use of the trademark "Dairy Queen." *Id.*

[32] *Id.* at 479.

[33] *Id.* at 479-80. *But see* 5 J. MOORE FEDERAL PRACTICE ¶ 3.16[4] at 162.9 n.9 (2d ed. 1979) (application of clean-up doctrine allowed after *Dairy Queen*).

[34] The "clean-up" doctrine permitted a court of equity to resolve both legal and equitable issues in a case, once the equity court had obtained jurisdiction. Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation,* 100 U. PA. L. REV. 320, 320 (1951); *see* Note, *Constitutional Law—Federal Rules—Right to Civil Jury Trial,* 15 ALA. L. REV. 562, 565-66 (1963) (equity retains the suit and grants entire relief, even though some legal matters are determined in the process).

[35] 369 U.S. at 478. The Court said: "[I]n order to maintain a suit . . . cognizable at

The argument in favor of a complexity exception gained impetus in *Ross v. Bernhard.*[37] There, plaintiffs in a stockholders' derivative action[38] sought an accounting and reimbursement for losses which resulted from defendants' mismanagement.[39] As in *Beacon Theatres* and *Dairy Queen,* both legal and equitable issues were presented.[40] The Supreme Court ordered a jury trial,[41] holding that it was not the character of the overall action that controlled the seventh amendment question, but rather the nature of the specific issues to be tried.[42] In a footnote, the Court fashioned a three-prong test to determine whether the nature of an issue was legal or equitable.[43] Under the test, whether a litigant is entitled to a jury trial is determined by the customary treatment of the issue prior to the merger of law and equity, the remedy sought, and the practical limitations and abilities of juries.[44]

Several lower courts have elected to follow the *Ross* test in determining the seventh amendment question. In *In re Boise Cascade Securities Litigation,*[45] the district court, denying a jury trial of the case,[46] held that *Ross* had recognized an exception to the seventh amendment.[47] The court, following the *Ross* test, reasoned that the

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law, . . . the plaintiff must be able to show that the 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." *Id.* (footnote omitted). *Accord,* Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887) (must conclude jury is unable to understand facts before case can be tried to a judge).

[36] 369 U.S. at 478-79.

[37] 396 U.S. 531 (1970).

[38] *Id.* at 531-32.

[39] *Id.* at 532. Plaintiffs alleged that defendants' actions had amounted to "waste and spoliation." *Id.*

[40] *Id.* at 542.

[41] *Id.*

[42] *Id.* at 538. The Court stated: "[T]here is a right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of a common issue existing between the claims." *Id.* (citing *Beacon Theatres* and *Dairy Queen*). The decision has been labeled "the culmination of the Court's deviation from the historical test." Note, *Jury Trial in Stockholders' Derivative Suit,* 65 Nw. U.L. Rev. 697, 701 (1970) (extension of jury trial to suits traditionally heard in equity was a major change from historical treatment).

[43] 396 U.S. at 538 n.10.

[44] The Court stated: "[T]he 'legal' nature of an issue is determined by considering, first, the pre-merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries." *Id.* According to the Court, the first test, the traditional historical test, would be the most difficult to determine. *Id.*

[45] 420 F. Supp. 99 (E.D.N.Y. 1976).

[46] *Id.* at 105.

[47] The court was of the opinion that the *Ross* footnote was "of constitutional pro-

complexity of the case, which involved a consolidation of securities fraud actions,[48] exceeded the practical ability of a jury to reach an informed and impartial verdict.[49] In *Bernstein v. Universal Pictures, Inc.*,[50] involving alleged violations of federal copyright and antitrust laws,[51] the district court held that the third prong of the *Ross* test was no more than a restatement of the traditional equity powers of courts,[52] which include the power to assume jurisdiction over complex cases.[53] In denying a jury trial of the action, the court cited the anticipated length of trial, the large number of litigants, and the nature of the damages as contributing to the prohibitive complexity of the case.[54] In *ILC Peripherals Leasing Corp. v. IBM*[55] plaintiffs charged IBM with monopolizing certain segments of the computer industry.[56] A mis-

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portions." *Id.*

[48] Several plaintiffs charged that Boise Cascade, its accountant, officers, and directors had violated federal antitrust laws. The cases were consolidated for trial, and a special master was appointed to supervise discovery. *Id.* at 101.

[49] *Id.* at 104-05. The district court reasoned that the anticipated length of trial would preclude employed persons from jury service, thus destroying the "appearance of fairness" by eliminating those familiar with business. The court held further that because a sizable portion of the community would be excluded from service, the jury's collective background and knowledge would be extremely limited. The court concluded that since it could utilize tools unavailable to a jury, including review of daily transcripts and testimony from reporter's notes, personal questioning of witnesses, and admission of depositions into evidence, it was more capable of deciding the case fairly and competently than the jury. *Id. But see* Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power,* 56 TEX. L. REV. 47, 50 (jury more capable than judge to hear complex case).

[50] 79 F.R.D. 59 (S.D.N.Y. 1978).

[51] *Id.* at 61-62. A class of composers and lyricists charged that certain producers and distributors of television programs and motion pictures had conspired to restrain trade by depriving plaintiffs of the copyright to their work. Additionally, plaintiffs alleged that defendants violated federal antitrust laws by monopolizing the American motion picture and television industry. *Id.*

[52] For a thorough discussion of the traditional equity powers of courts, see Arnold, *supra* note 17; Campbell & LePoidevin, *supra* note 17.

[53] *Id.* The district court reasoned that at common law a judge could reserve for himself cases involving complex writings, especially in regions where illiteracy rendered jurors incapable of understanding the issues of the case. The district court cited Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603), as an early example of this form of equity jurisdiction. *See* Campbell & LePoidevin, *supra* note 17, at 974-85 (bench trial granted because of case's complexity). *But see* Arnold, *supra* note 17, at 840-46 (inadequacy of legal remedy was the basis for equity jurisdiction).

[54] 79 F.R.D. at 70.

[55] 458 F. Supp. 423 (N.D. Cal. 1978).

[56] *Id.* at 426. In controversy were such matters as what constituted a "market," whether prices charged by IBM on specific and highly technical computer components

trial was declared when the jury was unable to reach a verdict,[57] and on retrial the district court held, under the authority of *Ross*,[58] that the case was too complex to be tried to a jury.[59]

While the courts in *Boise Cascade, Universal Pictures,* and *ILC Peripherals* interpreted *Ross* as creating a complexity exception to the seventh amendment,[60] other courts have forsworn this conclusion. In *Radial Lip Machine, Inc. v. International Carbide Corp.*,[61] an action for patent and trademark infringement and breach of contract,[62] the district court flatly rejected *Boise Cascade's* interpretation of the *Ross* test.[63] The court held that *Ross* did not contemplate consideration of the complexity of individual law suits.[64] Instead, the court said the *Ross* test was intended to be employed only in answering the threshold question of whether an entire class of legal claims was too complex to be tried to a jury.[65] The court concluded that the complexity of the

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were predatory, and whether IBM's introduction of certain products into the market was anticompetitive. *Id.* at 426-36.

[57] The trial lasted five months, and after 19 days of deliberation the jury announced that it was deadlocked and could not reach a verdict. *Id.* at 448.

[58] *Id.*

[59] *Id.* at 426-27. The district court found that the jurors had failed to understand much of the evidence presented in the case, including the testimony of several expert witnesses, and that most of the jurors indicated that they thought the case should have been tried to the court. *Id.* at 444-47. The court reasoned that the situation presented in *ILC Peripherals* differed from that presented in *Boise Cascade* and *Bernstein.* In those cases, jury trials were denied because it was likely the cases were too complex for a jury. In *ILC Peripherals,* the case had been tried to the jury and had proved too complex for a jury to handle. The court feared that if the case were again tried to a jury, the jury would feel compelled to reach a decision, even if the case proved too difficult or impossible for it to understand. The court noted that such a verdict was likely to be arbitrary and concluded that while the seventh amendment guarantees the right to a jury trial of every case, the right should be limited to one jury trial. *Id.* at 447-48.

[60] For cases adopting a similar interpretation, see Cleverly v. Western Elec. Co., 69 F.R.D. 348, 350-53 (W.D. Mo. 1975) (jury trial denied because of complexity of suit under Age Discrimination in Employment Act), *aff'd,* 594 F.2d 638 (8th Cir. 1979); Cayman Music, Ltd. v. Reichenberger, 403 F. Supp. 794, 796-97 (W.D. Wis. 1975) (complexity of copyright infringement case sufficient to deny jury trial).

[61] 76 F.R.D. 224 (N.D. Ill. 1977).

[62] The lawsuit arose from corporate transactions which transferred patent rights and created contractual obligations between the parties. *Id.* at 225-26.

[63] *Id.* at 227. The court viewed the *Boise Cascade* interpretation as leading to an intolerable dilution of the right to jury trial. *See* Higginbotham, *supra* note 49, at 54-60 (jury lends fairness and flexibility to judicial system).

[64] 76 F.R.D. at 227.

[65] *Id.* at 229. *But see* Note, *The Right to Jury Trial in Complex Cases,* 92 HARV. L. REV. 898, 912 (1979) (*Ross* test should be applied on case by case basis and not to general class of claims).

claim at issue in *Radial Lip* did not surpass the practical ability of a jury.[66]

The Ninth Circuit rejected *Ross* in *In re United States Financial Securities Litigation.*[67] There, purchasers of defendant's debenture and stock offerings charged defendant with violations of federal and state securities laws, fraud, and negligence.[68] Directing a jury trial,[69] the court expressed doubt that the Supreme Court would cast aside a two hundred year old historical test in a footnote,[70] and held that the footnote in *Ross* was never intended as the basis for an exception to the seventh amendment.[71] Noting that the Supreme Court had never invoked the *Ross* test,[72] the Ninth Circuit chose instead to employ the

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[66] 76 F.R.D. at 229.

[67] 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 100 S. Ct. 1866 (1980).

[68] 609 F.2d at 414-16.

[69] *Id.* at 432.

[70] *Id.* at 425.

[71] *Id.* Commentators have also expressed doubt about the precedential value of the *Ross* test. *See, e.g.*, C. WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 454 (3d ed. 1976) (*Ross* test considered invalid); Redish, *supra* note 13, at 526 (footnote so devoid of authority and analysis as to be nonbinding); Note, *supra* note 17, at 126-30 (Supreme Court's failure to apply *Ross* is indicative of test's lack of importance as a precedent); 24 CASE W. RES. L. REV. 406, 415-16 (1973) (*Ross* test's constitutional stature doubtful).

[72] The Ninth Circuit cited five cases in which the Supreme Court could have employed the *Ross* test, but did not. 609 F.2d at 426 n.48. In Parklane Hosiery v. Shore, 439 U.S. 322 (1979), a stockholders' derivative action, the Court held that a request for a jury trial should have been denied where the request was for an advisory jury in equity and not for a trial jury at law. The Court failed to mention *Ross* in its analysis of the jury trial issue. *Id.* at 333-37.

Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442 (1977), involved an appeal of an administrative penalty under the Occupational Safety and Health Act. The Court's opinion focused on the scope of the seventh amendment and not on the limitations of juries. The Court held that Congress may assign adjudication of "public rights" created by statute to administrative agencies, in which case a jury trial is not guaranteed by the seventh amendment. *Id.* at 450.

Another statutory right, the right of a landlord in the District of Columbia to evict a tenant for nonpayment of rent, was considered by the Court in Pernell v. Southall Realty, 416 U.S. 363 (1974). The tenant's request for a jury trial had been denied. The Supreme Court held that the statute, in creating the landlord's remedy, created an action at law. The Court employed the historical test instead of the *Ross* test and analogized the statutory action with an action at law. Because the action was a legal one, the Court concluded the seventh amendment guaranteed a jury trial. *Id.* at 384-85.

The plaintiff in Curtis v. Loether, 415 U.S. 189 (1973), brought a civil action charging the defendant with violating Title VII of the Civil Rights Act. Her request for a jury trial was denied. The Supreme Court reversed, holding that if a statute creates legal rights, enforceable in actions for damages in a court of law, then the seventh amendment guarantees a right to a jury trial. *Id.* at 194.

Montana's statutory provision for a six-member civil jury was challenged in Colgrove traditional historical test[73] and found no reason for denying a jury trial.[74] While the court acknowledged the existence of a right to a competent finder of fact,[75] it rejected the argument that a jury trial of the case would infringe the fifth amendment due process rights of the litigants.[76] The court concluded that the complexity of the case at hand did not preclude a competent jury verdict.[77]

In the instant case, the court held that since no statutory right to trial by jury exists under the antitrust laws,[78] and since the *Ross* test is of questionable constitutional import,[79] the traditional historical

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v. Battin, 413 U.S. 149 (1973). The Court held that a six-member jury was capable of dispensing justice and upheld the statute. *Id.* at 160.

[73] *See* notes 14, 15 and accompanying text *supra.*

[74] The court found that antitrust actions are cognizable at law and not in equity. 609 F.2d at 431-32.

[75] The court "assume[d], without deciding, that there is such a right to a 'competent' fact-finder." *Id. See* Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 208 (1976) ("Due process of law entails a process under which litigated matters will be decided by an arbiter within whose competence they lie.").

[76] Appellees contended that, because of the magnitude and size of the litigation, a jury would not be able to make a rational decision. 609 F.2d at 427. Appellees theorized that the fifth amendment required "fairness" in judicial proceedings. *Id.* Commentators have agreed with this contention. *See, e.g.,* Comment, *supra* note 17, at 600 (fair trial requires that finders of fact be able to comprehend the issues and render a rational verdict).

The Supreme Court has recognized that due process includes the principles of fairness. *See, e.g.,* Hannah v. Larche, 363 U.S. 420, 422 (1960) (due process requires fairness); Kinsella v. United States, 361 U.S. 234, 246 (1960) (unfairness a violation of due process); Galvin v. Press, 347 U.S. 522, 530 (1954) (fairness required by due process). In *United States Financial,* appellees took the position that trying the case to an arguably incompetent jury would offend principles of fairness and thereby violate the due process requirements of the fifth amendment. 609 F.2d at 427.

[77] 609 F.2d at 427. The court observed that there are procedures by which a complex case could be made less unwieldy. For example, attorneys could organize information and present it in an understandable form to the jury. The court observed further that "attorneys may do a better job of trying a complex case to a jury than to a judge." *Id.* (footnote omitted). *See* Higginbotham, *supra* note 49, at 54-55 (jury's presence encourages clear presentation of facts during trial).

The MANUAL FOR COMPLEX LITIGATION (4th ed. 1977) suggests several methods for organizing and controlling complex proceedings. A trial court may also appoint a special master to assist the jury under the Federal Rules of Civil Procedure. FED. R. CIV. P. 53(b). For other methods by which a complex case may be simplified, see generally Note, *supra* note 65, at 918.

[78] The court examined the language of the statutes and found no jury trial requirements. 631 F.2d at 1075-76. Additionally, it found nothing in the legislative history of the statutes indicating an intent to guarantee a jury trial. *Id.* at 1076.

[79] *See* notes 70 through 72 and accompanying text *supra.*

test[80] should be employed in seventh amendment questions.[81] The court further held that since, under the historical test, antitrust actions are cognizable at law and not in equity,[82] the seventh amendment guarantees the right to a jury trial of antitrust cases.[83] The court concluded, however, that since fifth amendment due process entitles a litigant to a competent finder of fact,[84] the seventh amendment must yield to the fifth in cases too complex for a jury to understand.[85]

The dissenting judge contended that since denial of a jury trial on due process grounds allows broad discretion by the trial judge,[86] and since there is no guarantee that an erroneous denial of a jury trial will be overturned,[87] the majority decision constitutes an unacceptable alteration of the nature of the judicial process.[88]

The instant case seems to establish complexity as a constitutionally compelled limitation on the seventh amendment guarantee of a jury trial. The court, while stating that "it [was] unlikely that the Supreme Court would have announced an important new application of the seventh amendment in so cursory a fashion,"[89] nonetheless decided that the *Ross* footnote indicated the Court's receptiveness to an exception to the broad seventh amendment guarantee.[90] At the very least, the Court of Appeals for the Third Circuit has stated that a jury's competence is an issue in determining whether a case is to be given a bench or jury trial. While *Ross* did not specify the scope and purpose of the inquiry into complexity, the instant case uses it as a guide to projecting the procedural dictates of the fifth amendment into the seventh amendment right to a jury, and thereby gives the *Ross* test constitutional status.

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[80] *See* notes 14, 15 and accompanying text *supra.*

[81] 631 F.2d at 1079-80.

[82] *See* notes 20, 21 and accompanying text *supra.*

[83] 631 F.2d at 1079.

[84] *See* notes 75, 76 and accompanying text *supra.*

[85] 631 F.2d at 1089. The circuit court did not define "too complex."

[86] The dissent expressed fear that a trial judge's decision might be colored "by unarticulated sympathies for or hostilities toward the underlying policies sought to be advanced in the lawsuit." *Id.* at 1093 (Gibbons, J., dissenting). *See* Higginbotham, *supra* note 49, at 49-50 (seventh amendment intended to temper judges' arbitrary powers); Note, *supra* note 65, at 913-14 (most judges' decisions influenced by personal bias).

[87] 631 F.2d at 1093 (Gibbons, J., dissenting). An erroneous denial of jury trial may be corrected by issuance of a writ of mandamus. *Id.* Judge Gibbons predicted, however, that this would prove ineffective in preventing erroneous determinations of seventh amendment questions. He emphasized that mandamus is difficult to obtain and expressed concern that appellate courts might be reluctant to overturn the verdict of a judge in an otherwise error-free trial. Judge Gibbons concluded that in cases relying on the majority decision few, if any, mistakes on the jury trial question would be corrected. *Id.*

[88] *Id.*

[89] *Id.* at 1080.

[90] *Id.*

On the surface, the instant decision would seem to be irreconcilable with the Ninth Circuit's decision in *United States Financial.* In *United States Financial,* however, the court did not reject the idea of a complexity exception; on the contrary, it acknowledged the right to a competent jury.[91] That court simply could not accept a mere footnote as giving rise to an exception of constitutional proportions.[92] In a case with the proper fact situation, however, it might have accepted a due process analysis.

The court's use of the *Ross* test in the instant case directs the lower courts in the Third Circuit to make a functional inquiry in each case to keep the jury trial determination within the bounds of procedural due process. Moreover, in those jurisdictions accepting the complexity exception, the courts are relieved of the elusive remnants of the historical law-equity distinction[93] and provided with a comprehensive test based on the nature of the issue, the remedy sought, and the practical abilities and limitations of the jury.[94]

Because of the complexity of the issues involved in protracted commercial litigation, such as antitrust, securities, and patent cases, it is reasonable to forecast a procedural trend to nonjury trials. This would be a departure from the policy of incorporating into the trial the collective wisdom, civic experience, and community values of the jury, but a lengthy, very complex trial produces the same effect; protracted litigation effectively precludes participation in the legal process by a fair cross-section of the community.

Since the court remanded the instant case for a determination of complexity without delineating the factors sufficient to render a jury incompetent, it implicitly ruled that the exception should be applied on a case by case basis. Consequently, in every action governed by the complexity exception, jury competence will be decided according to the specific factual problems presented. It will, therefore, be difficult for the lower courts to apply the exception. It may be advisable for courts to determine initially whether innovative trial techniques can help to simplify a complex case and bring it within the competence of a jury.

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[91] *See* note 75 and accompanying text *supra.*

[92] *See* notes 70, 71 and accompanying text *supra.*

[93] *See* note 17 *supra.*

[94] *See* note 44 *supra.*

This may be a less drastic means of accommodating the guarantees of the fifth and seventh amendments than resort to a complexity exception. Since such an exception does, however, provide constitutional protection against an irrational jury verdict, the Supreme Court may find sufficient justification for hearing and affirming the instant case, and thus put a vigorously contested constitutional issue to rest.

Lauren Gordon Alexander
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CIVIL RIGHTS—FEDERAL JURISDICTION—EXHAUSTION OF ADEQUATE AND APPROPRIATE STATE ADMINISTRATIVE REMEDIES IS A PREREQUISITE FOR JUDICIAL REVIEW UNDER SECTION 1983

Georgia Patsy, a white female secretary, brought a civil rights action under section 1983 of title 42 of the United States Code[1] against Florida International University[2] in the United States District Court for the Southern District of Florida, alleging employment discrimination in violation of the Constitution and laws of the United States.[3] The district court dismissed the action for failure to exhaust state administrative remedies.[4] The Court of Appeals for the Fifth Circuit reversed on the ground that failure to allege exhaustion of state remedies did not preclude a section 1983 cause of action.[5] On rehearing en banc, the court of appeals, *held*, vacated and remanded.[6] Absent any of the traditional exceptions to the general rule of exhaustion, all adequate and appropriate state administrative remedies must be exhausted before actions can be brought under section 1983. *Patsy v. Florida International University*, 634 F.2d 900 (5th Cir. 1981).

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[1] 42 U.S.C. § 1983 (Supp. III 1979) provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Plaintiff asserted jurisdiction under 28 U.S.C. § 1343(a)(3), the jurisdictional counterpart of 42 U.S.C. § 1983. 28 U.S.C. § 1343(a)(3) (Supp. III 1979) provides:

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States
>
> . . . .

[2] Suit was filed against the Board of Regents of the State of Florida on behalf of Florida International University. Patsy v. Florida Int'l Univ., 634 F.2d 900, 902 (5th Cir. 1981).

[3] Plaintiff alleged that she was discriminated against on the basis of her race and sex in being rejected for jobs for which she was qualified. She further contended that individuals from minority groups were hired and promoted to the exclusion of more qualified individuals. *Id.*

[4] *Id.*

[5] Patsy v. Florida Int'l Univ., 612 F.2d 946, 946-47 (5th Cir.), *rehearing granted*, 617 F.2d 442 (1980), *vacated and remanded en banc*, 634 F.2d 900 (1981).

[6] 634 F.2d at 914. The court of appeals reheard the case en banc to decide whether to adopt an automatic no-exhaustion rule in section 1983 cases or to adhere to a more

Section 1983, enacted as part of the Civil Rights Act of 1871,[7] was promulgated to provide a private federal remedy for deprivation of rights under color of state law.[8] Initially the statute was seldom utilized because of the strict interpretation applied to it by the Supreme Court.[9] In the 1940's, however, the Court began to broaden its interpretation of the statute by redefining the phrase "under color of law."[10]

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flexible rule of exhaustion "in appropriate cases." *Id.* at 902.

[7] Section 1983 was originally § 1 of the Ku Klux Act of Apr. 20, 1871, ch. 22, 17 Stat. 13. Monroe v. Pape, 365 U.S. 167, 171 (1961). The source of the statute was a message to Congress by President Grant on March 23, 1871 declaring:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of state authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

Id. at 172-73 (quoting CONG. GLOBE, 42d Cong., 1st Sess. 244 (1871)).

[8] See note 1 *supra*. The immediate purposes of the Civil Rights Act were to prevent invidious discrimination by the states against their citizens, to provide an adequate remedy where one was lacking in the state law, and to provide a federal remedy where a state remedy existed in theory but not in practice. Monroe v. Pape, 365 U.S. 167, 173-74 (1961). For a discussion of the legislative history of the Civil Rights Act, see Gressman, *The Unhappy History of the Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952).

[9] *See, e.g.*, The Civil Rights Cases, 109 U.S. 3, 25-26 (1883) (declaring the first and second sections of the Civil Rights Act void because they were not authorized by the thirteenth or fourteenth amendments); United States v. Harris, 106 U.S. 629, 644 (1883) (no cause of action established because statutes arising from the Civil Rights Act were declared unconstitutional for lack of authority).

[10] *See, e.g.*, Screws v. United States, 325 U.S. 91, 111 (1945) ("under color of law" redefined to mean "under pretense of law," which included official acts of public officers whether or not within scope of their authority); United States v. Classic, 313 U.S. 299, 326 (1941) (misuse of power when the wrongdoer is clothed with the authority of state law is action "under color of" state law); Hague v. C.I.O., 307 U.S. 496, 531-32 (1939) (federal courts have jurisdiction over suits authorized by law to be brought under § 1983).

The Court's interpretations of the "under color of law" language of § 1983 were taken collectively to mean that actions of public officials fell "under color of law" regardless of whether they were (1) beyond the scope of authority, (2) within the scope of authority but conducted in a manner prohibited by the Constitution, or (3) within a

Thus, litigants were afforded easier access to a federal forum.[11]

On its face, section 1983 appears to provide an ideal cause of action for the civil rights litigant.[12] The statute has been limited, however, by the occasional requirement that the plaintiff exhaust state administrative remedies before bringing suit in federal court.[13] One of the reasons advanced for requiring exhaustion is that administrative agencies are best able to make determinations of fact.[14] Presumably, after such a factual determination, the case can be decided in an orderly manner, either by an administrative agency or by the courts.[15]

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scope of authority that was constitutionally void. Monroe v. Pape, 365 U.S. 167, 183-202 (1961).

[11] *See Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1169 (1977) (result of decisions was greater availability of § 1983 actions for victims of police misconduct and for redress of first amendment violations). In the years following this initial expansion, the substantive scope of the section was gradually broadened by the incorporation of some of the guarantees of the first ten amendments into the fourteenth amendment's due process clause and by development of the due process and equal protection doctrines. *Id.*

[12] Any person deprived of a federal or constitutional right may bring suit under § 1983 if some form of state action is involved. This requirement is met when the state government is directly or indirectly involved. *See, e.g.*, Green v. Dumke, 480 F.2d 624, 628-29 (9th Cir. 1973) (relevant inquiry focuses on whether the authority of the state was exerted in enforcing the law); Lorentzen v. Boston College, 440 F. Supp. 464, 465 (D. Mass. 1977) ("state action" is essential element of cause of action under § 1983), *cert. denied*, 440 U.S. 924, *rehearing denied*, 441 U.S. 917 (1979). *See also* Note, *Exhaustion of State Administrative Remedies Under the Civil Rights Act*, 8 IND. L. REV. 565, 569-70 (1975) (provisions and use of § 1983). When the state is directly involved, those who participate with the state may also be liable. *E.g.*, United States v. Price, 383 U.S. 787, 795-96 (1966) (private citizens acted under color of law when they acted in concert with police); Norton v. Liddel, 620 F.2d 1375, 1381 (10th Cir. 1980) (private party conspiring with state official liable under § 1983); Fine v. City of New York, 529 F.2d 70, 73-77 (2d Cir. 1975) (attorney participating in police raid acted under color of law); Wegwart v. Eagle Movers, Inc., 441 F. Supp. 872, 878-79 (E.D. Wis. 1977) (private party acting with state officials acted under color of law for purposes of § 1983).

[13] *See* Note, *Limiting the Section 1983 Action in the Wake of Monroe v. Pape*, 82 HARV. L. REV. 1486, 1498-1501 (1969) (exhaustion of state administrative remedies once black letter law, now only an occasional requirement).

[14] *See* McGee v. United States, 402 U.S. 479, 490-91 (1971) (petitioner's failure to take administrative appeal deprived the draft board of an opportunity to apply its expertise). It has been postulated that administrative agencies should serve as expert supervisory bodies because they are more familiar with local factors affecting the suit. In addition, administrative remedies are generally less costly than federal judicial remedies, as well as more efficient and expedient. *See generally* K. DAVIS, ADMINISTRATIVE LAW TEXT § 20.02 (3d ed. 1972).

[15] *See* Bradley v. Weinberger, 483 F.2d 410, 415 (1st Cir. 1973) (the exhaustion requirement is grounded in substantive concerns not only of fairness and orderly procedure, but also of competency; specialized agencies, not the courts, are best equipped to

The requirement of exhaustion has been subject to a number of exceptions.[16] First, the administrative agency must have jurisdiction over the controversy before the doctrine will be applicable.[17] Second, exhaustion of state judicial, as distinguished from administrative, remedies has not been required.[18] Third, the requirement has been waived

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serve this function).

[16] McKart v. United States, 395 U.S. 185, 193 (1969). The Court also noted that "[a]pplication of the doctrine to specific cases requires an understanding of its purposes and of the particular administrative scheme involved." *Id.*

[17] *See* Chicago v. Atchison, T. & S.F. Ry., 357 U.S. 77, 89 (1958) (exhaustion not required when agency involved lacks jurisdiction); Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919) (exhaustion not required in suit to enjoin alleged ultra vires agency action). *But see* Toilet Goods Ass'n, Inc. v. Gardner, 387 U.S. 158, 166 (1967) (exhaustion required in suit to enjoin alleged ultra vires agency action). One may challenge an agency's jurisdiction prior to completion of the administrative process when the agency's action is (1) unauthorized by statute, (2) unconstitutional, or (3) based on an allegedly unconstitutional authorizing statute. *See* K. DAVIS, *supra* note 14, § 20.02-.04, at 383-89.

[18] *See* Lane v. Wilson, 307 U.S. 268, 274 (1939) (absent exceptional circumstances or explicit statutory requirements, it is not necessary to exhaust state judicial remedies); Dove v. Parham, 282 F.2d 256, 262 (8th Cir. 1960) (not necessary to exhaust state judicial remedies to vindicate federal constitutional rights unless federal statute so requires). *But cf.* Potwora v. Dillon, 386 F.2d 74, 77 (2d Cir. 1967) (federal court will not hear a suit in equity where there is an adequate remedy at law in state court); Wright v. McMann, 257 F. Supp. 739, 747 (N.D. N.Y. 1966) (plaintiff must exhaust state court remedies in § 1983 case before the court may assume jurisdiction), *rev'd on other grounds*, 387 F.2d 519, 522-24 (2d Cir. 1967) (intimation that lower court was wrong, and exhaustion of state judicial remedies should not be required); *Developments in the Law—Section 1983 and Federalism*, 90 HARV. L. REV. 1133, 1266-72 (1977) (noting renewed attentiveness to availability of adequate state judicial remedies in the resolution of § 1983 cases).

When state judicial remedies are involved, the underlying rationale for the exception to the exhaustion requirement is that judicial remedies are essentially interchangeable. While § 1983 states a cause of action, 28 U.S.C. § 1343(3) provides original, but not exclusive, jurisdiction in the federal courts. Therefore, state courts may exercise concurrent jurisdiction, although § 1983 claims are subject to removal to federal court. *See* Rzeznik v. Chief of Police of Southhampton, 373 N.E.2d 1128, 1134 n.8 (Mass. 1978) (§ 1983 state court concurrent jurisdiction presumed); Board of Trustees v. Holson, 584 P.2d 1009, 1017 (Wyo. 1978) (state courts have concurrent jurisdiction in § 1983 actions). If the plaintiff is required to exhaust state judicial remedies, he will be precluded from bringing his § 1983 claim in federal court because of the collateral estoppel or res judicata effects of the state court determination. Robbins v. District Court, 592 F.2d 1015, 1018 (8th Cir. 1979) (state court holding in identical § 1983 action held res judicata). This collateral estoppel/res judicata effect does not apply to state administrative determinations since neither state nor federal courts are bound by a state administrative decision. *See* Lane v. Wilson, 307 U.S. 268, 274 (1939) (judicial proceedings do not confer upon the courts any of the discretionary or initiatory functions that are characteristic of administrative agencies). *See also* Comment, *Exhaustion of State Administrative Reme-*

when the administrative remedy was clearly inadequate, unnecessary, or futile.[19] Fourth, exhaustion has not been required when the claimant alleged that the administrative remedy itself was unlawful or unconstitutional.[20] Fifth, where a plaintiff sought to have a legislative act declared unconstitutional and the administrative remedy would leave the constitutional question standing, exhaustion has not been required.[21] Finally, the requirement has been waived when the litigant would be subject to irreparable injury as a result of lengthy administrative proceedings that provided no interim relief.[22]

The general exhaustion requirement, although well-established,[23] had not been tested for section 1983 purposes[24] prior to the 1961 Su-

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dies in Section 1983 Cases, 41 U. Chi. L. Rev. 537, 541-42 (1974) (res judicata effect of state judicial determinations).

[19] *See, e.g.*, McKart v. United States, 395 U.S. 185, 197-98 (1969) (where the controversy involves only a question of statutory interpretation and there is no need for application of administrative interpretation or expertise, exhaustion is not required); Walker v. Southern Ry., 385 U.S. 196, 198 (1966) (administrative remedy resulting in 10-year delay in decision need not be exhausted); Buffalo Teachers Fed., Inc. v. Helsky, 435 F. Supp. 1098, 1103 (S.D.N.Y. 1977) (adequate administrative remedies must be pursued unless futile). *See generally* K. Davis, *supra* note 14, § 20.07, at 391-92 (discussion of inadequacy of administrative remedies).

[20] *See, e.g.*, Fuentes v. Roher, 519 F.2d 379, 387 (2d Cir. 1975) (exhaustion is not required where question of adequacy of administrative remedy is coextensive with the merits of the plaintiff's constitutional claim); Finnerty v. Cowen, 508 F.2d 979, 982-83 (2d Cir. 1974) (exhaustion not required in situations where the administrative procedure under attack is the one which the agency says must be exhausted); Salkay v. Williams, 445 F.2d 599, 601 (5th Cir. 1971) (exhaustion of administrative remedy not required where Supreme Court has ruled nearly identical procedure unconstitutional).

[21] *See* Public Utils. Comm'n v. United States, 355 U.S. 534, 539-40 (1958) (where the only question is whether it is constitutional to require the litigant to pursue an administrative remedy, the administrative agency may be defied and judicial relief sought). *See generally* K. Davis, *supra* note 14, at § 20.04.

[22] *See* Oklahoma Natural Gas Co. v. Russell, 261 U.S. 290, 293 (1923) (plaintiffs would not have adequate remedy for what they might lose before court acts).

[23] *See* Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (it is a long settled rule of judicial administration that no one is entitled to judicial relief for a supposed or threatened injury until prescribed administrative remedies have been exhausted). The exhaustion requirement has been applied most frequently in cases in which injunctive relief was sought. *See, e.g.*, Dalton Adding Mach. Co. v. State Corp. Comm'n, 236 U.S. 699, 700-01 (1915) (affirming ruling that injunction will not lie where administrative remedies are not exhausted); Pittsburgh, C.C. & St. L. Ry. v. Board of Pub. Works, 172 U.S. 32, 44-45 (1898) (administrative agency must reach decision before court will decide whether to issue an injunction).

[24] Prior to 1961 the Court had strongly implied but never specifically ruled that exhaustion is required in § 1983 cases. *See, e.g.*, Lane v. Wilson, 307 U.S. 268, 274 (1939) (state administrative remedies normally must be completed before resort to federal courts); Myers v. Bethlehem Shipbuilding Corp., 303 U.S. 41, 50-51 (1938) (not entitled

preme Court decision in *Monroe v. Pape*.[25] There, the Court stated in dictum that state remedies need not be exhausted before a litigant is entitled to a federal remedy.[26] In *Monroe*, Chicago police illegally searched a black citizen's home.[27] The plaintiff sought damages under section 1983.[28] In holding that the federal court had jurisdiction, the Supreme Court determined that the policemen had acted under color of state law,[29] and, therefore, the plaintiff was not required to exhaust state remedies before seeking a federal forum.[30] At issue, however, was exhaustion of state judicial, rather than administrative, remedies.[31] Thus, while *Monroe* is properly limited to its finding that exhaustion of state judicial remedies is not required,[32] subsequent decisions have construed the broad language used by the Court as establishing a no-exhaustion policy for both state judicial and administrative remedies in section 1983 cases.[33]

The liberal interpretation of *Monroe v. Pape* was fortified by *McNeese v. Board of Education*.[34] In *McNeese*, a group of black students brought suit in federal court under section 1983 alleging racial discrimination and demanding equitable relief.[35] The district court dis-

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to judicial relief until prescribed administrative remedy has been exhausted).

[25] 365 U.S. 167 (1961).

[26] *Id.* at 183.

[27] *Id.* at 169.

[28] *Id.*

[29] *Id.* at 183-87. Another issue was whether the City of Chicago could be sued as a person under § 1983. The Court held that it could not. *Id.* at 187. The decision on that issue was later overruled by Monell v. Department of Social Servs., 436 U.S. 658, 690, 701 (1978).

[30] 365 U.S. at 183. The Court, in reaching this decision, examined the history and purposes behind § 1983. *See* note 8 *supra*. One purpose was to provide a federal remedy where the state remedy was inadequate; but because the state remedy here was adequate, the plaintiff ordinarily would have been required to exhaust his state judicial remedy. The Court concluded, however, that the "federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." 365 U.S. at 183.

[31] The suit could have been brought in state court since unreasonable searches and seizures were unlawful under Illinois law. 365 U.S. at 183.

[32] *See* notes 18, 30 and accompanying text *supra*.

[33] *See, e.g.*, Houghton v. Shafer, 392 U.S. 639, 640-41 (1968) (resort to administrative remedies is unnecessary in light of *Monroe v. Pape*); King v. Smith, 392 U.S. 309, 312 n.4 (1968) (plaintiff bringing action under § 1983 is not required to exhaust administrative remedies where the constitutional challenge is sufficiently substantial); *cf.* Wright v. McMann, 387 F.2d 519, 523 (2d Cir. 1967) (exhaustion is not required when only legal relief is sought).

[34] 373 U.S. 668 (1963).

[35] *Id.* at 669-71.

missed the action for failure to exhaust administrative remedies; the court of appeals affirmed.[36] The Supreme Court reversed,[37] citing *Monroe* for the proposition that exhaustion of state administrative remedies was not necessary in section 1983 cases.[38] The Court qualified its holding, however, explaining that the state administrative remedy was inadequate and afforded only "tenuous protection" to the plaintiff's civil rights.[39]

Four years after *McNeese*, the Court was again urged to reconsider the exhaustion issue. In *Damico v. California*,[40] a group of welfare claimants challenged a state welfare law which required a three-month waiting period following the father's desertion before welfare benefits could be received under the California Aid to Families with Dependent Children Program.[41] A three-judge federal district court panel dismissed the complaint for failure to exhaust state administrative remedies.[42] In a per curiam opinion, the Supreme Court reversed, citing *Monroe* and *McNeese*.[43]

After *McNeese* and *Damico*, the exhaustion requirement in section 1983 cases appeared to be a dead issue.[44] In the early 1970's, however, two cases[45] were decided which indicated a change of direction from the Court's earlier liberal attitude toward exhaustion.[46]

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[36] *Id.* at 670.

[37] *Id.* at 676.

[38] *Id.* at 671.

[39] *Id.* at 675-76.

[40] 389 U.S. 416 (1967) (per curiam).

[41] *Id.* at 417 (Harlan, J., dissenting).

[42] *Id.* at 416-17.

[43] *Id.* at 417. The *Damico* Court quoted *McNeese* for the proposition that "relief under the Civil Rights Act may not be defeated because relief was not first sought under state law which provided [an administrative] remedy." *Id.* (quoting McNeese v. Board of Educ., 373 U.S. at 671) (bracketed material supplied by the Court in *Damico*). In *Damico*, the plaintiffs sought injunctive relief and a ruling on the constitutionality of the state statute. 389 U.S. at 416. Since the administrative agency was incompetent to declare a state statute unconstitutional, the administrative remedy was inadequate. The Court did not mention this point in the opinion; nevertheless, it may have been considered *sub silentio*.

[44] *See* Comment, *Exhaustion of State Remedies Under the Civil Rights Act*, 68 COLUM. L. REV. 1201, 1202-05 (1968) (evaluation of exhaustion requirement after *Monroe, McNeese*, and *Damico*).

[45] Preiser v. Rodriguez, 411 U.S. 475 (1973); Gibson v. Berryhill, 411 U.S. 564 (1973). For a discussion of these cases, see notes 47 through 59 and accompanying text *infra*.

[46] *See, e.g.*, Wilwording v. Swenson, 404 U.S. 249, 251-52 (1971) (per curiam) (claims for relief under the Civil Rights Act are not subject to exhaustion requirements); Zwickler v. Koota, 389 U.S. 241, 248 (1967) (plaintiff has a right to pursue federal consti-

In *Preiser v. Rodriguez*,[47] New York inmates alleged that they had been unconstitutionally deprived of good time credits and sought injunctive relief to have the credits restored.[48] At issue was whether the prisoners could bring suit under section 1983 without first exhausting state administrative remedies or whether their sole remedy lay in a writ of habeas corpus.[49] The district court held that the action was properly brought under section 1983 and that exhaustion was, therefore, not required.[50] The court of appeals reversed, concluding that section 1983 could not be utilized where the application to the court was for habeas corpus relief.[51] On rehearing en banc, however, the court of appeals affirmed the district court decision, reasoning that the nature of the action was such that it could be maintained under either section 1983 or the habeas corpus statute.[52] The Supreme Court reversed, holding that the federal habeas corpus statute was the plaintiffs' exclusive remedy,[53] and they could not escape the exhaustion requirement by suing under section 1983.[54]

In *Gibson v. Berryhill*,[55] a case decided the same day as *Preiser*, the Court was presented with a similar question. In *Gibson*, Alabama

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tutional claims in a federal forum).

[47] 411 U.S. 475 (1973).

[48] *Id.* at 476.

[49] *Id.* at 477. The habeas corpus statute, 28 U.S.C. § 2254 (1976) provides in pertinent part:

> (b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.
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> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

[50] Rodriguez v. McGinnis, 307 F. Supp. 627, 632 (N.D.N.Y. 1969).

[51] Rodriguez v. McGinnis, 451 F.2d 730, 733 (2d Cir. 1971).

[52] Rodriguez v. McGinnis, 307 F. Supp. 627 (N.D.N.Y. 1969), *rev'd*, 451 F.2d 730 (2d Cir. 1971), *aff'd on rehearing en banc*, 456 F.2d 79, 80 (2d Cir. 1972), *rev'd sub nom.* Preiser v. Rodriguez, 411 U.S. 475 (1973).

[53] 411 U.S. at 500.

[54] The Court also said that when a prisoner puts forth a constitutional challenge to the conditions of his confinement, § 1983 is an appropriate remedy. *Id.* at 498-500. When the prisoner challenges the fact or duration of his confinement as a means to a more expedient release from prison, however, the exclusive remedy lies under the federal habeas corpus statute. *Id.*

[55] 411 U.S. 564 (1973).

optometrists brought suit seeking injunctive relief from a pending decision of the state licensing board.[56] The plaintiffs claimed that the board was incapable of rendering a fair decision because of internal bias.[57] The Court held that exhaustion was unnecessary since resort to the administrative remedy would not provide adequate relief.[58] Language in the decision indicated that exhaustion might be required in cases where the plaintiff suffers no risk of loss until the administrative proceeding is completed.[59]

More recently, in *Barry v. Barchi*,[60] the Court again declined to limit the availability of section 1983 to plaintiffs who had exhausted state administrative remedies. In this case, the plaintiff was a horse trainer whose horse was shown in a post-race test to have been drugged.[61] The plaintiff's license was suspended without a hearing by the New York State Racing and Wagering Board. Although the plaintiff was allowed an opportunity for a post-suspension hearing,[62] the plaintiff instead filed suit in federal district court alleging that the state regulation was unconstitutional. Specifically, the plaintiff contended that the regulations deprived him of his right to a hearing before suspension to determine his culpability and that the summary suspension could not be stayed pending review by the Board.[63] The Supreme Court, citing *Gibson*, stated that the plaintiff was not required to exhaust administrative remedies since the available remedy was inadequate.[64]

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[56] *Id.* at 569.

[57] *Id.* at 570. The Alabama Optometric Association and the Alabama Board of Optometry filed charges against the named optometrists for violating an Alabama statute prohibiting optometrists from practicing if they were not privately employed. *Id.* at 567. The Board charged that the named optometrists had accepted employment with a corporation and were, therefore, no longer privately employed. *Id.* at 568. The named optometrists countercharged that the Board was biased since it was composed entirely of privately employed optometrists who stood to gain financially if the named optometrists' licenses were suspended. *Id.* at 571.

[58] *Id.* at 574-75.

[59] The Court reasoned that:

> Normally when a State has instituted administrative proceedings against an individual who then seeks an injunction in federal court, the exhaustion doctrine would require the court to delay action until the administrative phase of the state proceedings is terminated. . . . But this Court has expressly held in recent years that state administrative remedies need not be exhausted when the federal court plaintiff states an otherwise good cause of action under 42 U.S.C. § 1983 [citations omitted]. Whether this is invariably the case even where, as here, a license revocation proceeding has been brought by the State and is pending before one of its own agencies and where the individual charged is to be deprived of nothing until the completion of that proceeding, is a question we need not now decide. . . .

Id. at 574-75.

[60] 443 U.S. 55 (1979).

[61] *Id.* at 59.

[62] The state regulation permitted the Board to suspend the plaintiff's license until a hearing determined whether or not the license should be reinstated. The regulation did not specify a time limit for conducting the hearing. In addition, the regulation permitted the Board to delay rendering a final decision for up to 30 days after the conclusion of the hearing. *Id.* at 60-61.

In determining whether or not the Supreme Court has eliminated the exhaustion requirement, lower courts have reached varying results.[65] Some circuits have taken a narrow view of the high court decisions. For example, in *Eisen v. Eastman*,[66] which involved the constitutionality of the New York rent control law, the Second Circuit held that an action could not be maintained until all available state administrative remedies had been exhausted.[67] Moreover, the court concluded that Supreme Court cases cited for the proposition that exhaustion was not required had been misconstrued;[68] the cases actually stood for the proposition that the requirement should not be applied woodenly.[69] Other circuits have continued to follow the *Monroe v. Pape* line of decisions.[70] Still others have taken a more flexible approach.[71] For example, in *Secret v. Brierton*,[72] the Seventh Circuit noted that the Supreme Court had not directly addressed the requirement of exhaustion of state remedies in section 1983 cases, and although the majority of the courts of appeals had interpreted Supreme Court pronouncements as establishing a broad, inflexible rule of non-exhaustion,[73] the Seventh Circuit declined to join the majority.[74]

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[63] *Id.* at 61.

[64] *Id.* at 63 n.10, 68.

[65] The cases holding that the Supreme Court decisions do not require exhaustion of state remedies, include, ironically, several Fifth Circuit cases. *See, e.g.*, Chisley v. Richland Parish School Bd., 448 F.2d 1251, 1252 (5th Cir. 1971) (per curiam) (where § 1983 is asserted, exhaustion of state remedies is not required); Hobbs v. Thompson, 448 F.2d 456, 461 (5th Cir. 1971) (same); Burnett v. Short, 441 F.2d 405, 406 (5th Cir. 1971) (plaintiff entitled to a federal forum in a § 1983 suit without regard to whether state remedies were pursued); Alabama Educ. Ass'n v. Wallace, 362 F. Supp. 682, 685 (M.D. Ala. 1973) (exhaustion not a prerequisite to § 1983 suit).

[66] 421 F.2d 560 (2d Cir. 1969), *cert. denied*, 400 U.S. 841 (1970).

[67] 421 F.2d at 569.

[68] *Id.* at 568. In reaching this conclusion, the court examined four cases. *McNeese* was distinguished because the *McNeese* plaintiff had no administrative remedy that would afford relief. *Id.* at 569. *Damico* involved an inadequate administrative remedy, and King v. State, 392 U.S. 309 (1968), did not require exhaustion because there was a sufficient constitutional question to require convening a three-judge court. Finally, Houghton v. Shafer, 392 U.S. 639 (1968), involved a futile administrative remedy. 421 F.2d at 569. Thus, the court concluded, since all of these cases involved an exception to the exhaustion requirement, it could not be said that the Supreme Court had abolished exhaustion. *Id.*; *see* notes 34 through 44 and accompanying text *supra*.

[69] 421 F.2d at 569.

[70] *See* note 65 *supra*; Ricketts v. Lightcap, 567 F.2d 1226, 1229 (3d Cir. 1977) (general rule in actions under § 1983 is that state remedies need not be exhausted as a prerequisite to federal jurisdiction); McCray v. Burrell, 516 F.2d 357, 364-65 (4th Cir. 1975) (inmates not required to exhaust administrative remedies under § 1983 before bringing

In the instant case the court reasoned that since important policy considerations favor exhaustion,[75] exhaustion should be required unless the facts of the case constitute an exception to the general requirement.[76] The court analyzed Supreme Court decisions and reasoned that since the Court had been reluctant to establish an iron-clad rule requiring exhaustion,[77] and since the Court indicated that it would permit a flexible approach to the question under appropriate circumstances,[78] exhaustion should be required except in situations clearly ex-

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suit against institution officials for injunctive relief or damages), *cert. dismissed as improvidently granted*, 426 U.S. 471 (1976); Hartmann v. Scott, 488 F.2d 1215, 1221 (8th Cir. 1973) (where statutory constitutionality is an issue, exhaustion is not required).

[71] *See, e.g.*, Gonzalez v. Shanker, 533 F.2d 832, 838 (2d Cir. 1976) (exhaustion not required where administrative remedy is inadequate); Palmigiano v. Mullen, 491 F.2d 978, 980 n.4 (1st Cir. 1974) (aggrieved person must pursue administrative process until the case is "ripe" for judicial determination); Elmwood Properties, Inc. v. Conzelman, 418 F.2d 1025, 1027 (7th Cir. 1969) (when exhaustion of remedies will eliminate any possible constitutional problems, that route should be followed), *cert. denied*, 397 U.S. 1063 (1970).

[72] 584 F.2d 823 (7th Cir. 1978). Plaintiff was a prisoner seeking relief for unlawful confiscation of his property. *Id.* at 824-25. The court held that the plaintiff must have exhausted all of his administrative remedies before federal court jurisdiction would lie. *Id.* at 831.

[73] *Id.* at 825-26.

[74] *Id.* at 831.

[75] The considerations listed by the court were:

> (1) to avoid premature interruption of the administrative process; (2) to let the agency develop the necessary factual background upon which decisions should be based; (3) to permit the agency to exercise its discretion or apply its expertise; (4) to improve the efficiency of the administrative process; (5) to conserve scarce judicial resources, since the complaining party may be successful in vindicating rights in the administrative process and the courts may never have to intervene; (6) to give the agency a chance to discover and correct its own errors; and (7) to avoid the possibility that "frequent and deliberate flouting of administrative processes could weaken the effectiveness of an agency by encouraging people to ignore its procedures."

634 F.2d at 903 (quoting McKart v. United States, 395 U.S. 185, 195 (1969)).

[76] 634 F.2d at 914; *see* notes 16 through 22 and accompanying text *supra*.

[77] 634 F.2d at 907.

[78] *Id.* at 904-08. The court noted that in City of Columbus v. Leonard, 443 U.S. 905, 910-11 (1979), Justices Rehnquist and Blackmun, as well as Chief Justice Burger, indi-

empted by Supreme Court pronouncements.[79] The Fifth Circuit also examined opinions of other courts of appeals and concluded that since several of these courts had taken an analytical approach to the exhaustion requirement, rather than a mechanical approach,[80] and since policy considerations[81] seem to outweigh the objections[82] to an exhaustion requirement, exhaustion should be required in all appropriate[83] section 1983 cases.[84]

The dissents[85] of Judges Rubin, Kravitch and Hatchett agreed

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cated in dissent that the time had come to reexamine *Monroe v. Pape* and the no-exhaustion decisions. 634 F.2d at 907-08.

[79] 634 F.2d at 908.

[80] The court found that the First, Second, Seventh and Ninth Circuits have adhered to a more flexible approach in applying the exhaustion requirement. *Id.* at 909; *see* note 71 and accompanying text *supra.*

[81] The court determined that the policy considerations in favor of a flexible exhaustion requirement were: (1) exhaustion of administrative remedies would promote a wiser allocation of judicial resources by eliminating extraneous issues, sifting through complicated facts, and defining the boundaries of uninterpreted statutes or regulations; (2) exhaustion insures that the action is ripe for adjudication since the agency is given an opportunity to correct any wrongs that may have been committed; (3) exhaustion improves the administrative process itself by giving the agency incentive and a chance to hone its procedures to comply with federal requirements; (4) administrative remedies are generally simpler, easier and less expensive for the parties involved; (5) exhaustion best serves the interests of comity and federalism. 634 F.2d at 911-12.

[82] The objections taken into consideration by the court were: (1) a blanket rule of no-exhaustion would thwart the purposes of § 1983, *see* note 8 *supra*, and (2) given the nature of the rights protected by § 1983, claims under this section should be adjudicated in the federal courts. 634 F.2d at 909-10.

[83] In determining the appropriateness of exhaustion in a particular case, the court set forth some guidelines: (1) an orderly system of review must be provided by statute or written agency rule; (2) the agency must be able to grant relief more or less commensurate with the claim; (3) relief must be available within a reasonable time; (4) procedures must be fair and not unduly burdensome, and must not be used to harass or otherwise discourage those with legitimate claims; (5) interim relief must be available to prevent irreparable injury and to preserve the litigant's rights under § 1983 until the administrative process has been concluded. After these factors have been taken into consideration, the court will also need to examine the particular administrative scheme involved, the nature of the interest the plaintiff seeks to protect, and the proper balance of these factors in the particular case. 634 F.2d at 912-13.

[84] The court pointed out that its decision is in no way a limitation upon § 1983 claims. Rather, the decision only prescribes the procedure to follow before bringing a § 1983 action in federal court. *Id.* at 912.

[85] There were three separate dissents: Judge Rubin dissented and was joined by Judges Vance, Frank M. Johnson, Jr., Hatchett, and Sam D. Johnson; Judge Kravitch dissented; and, in the third dissent, Judge Hatchett was joined by Judges Rubin, Vance, Thomas A. Clark, and Frank M. Johnson, Jr. *Id.* at 914-26 (Rubin, Kravitch & Hatchett, JJ., dissenting).

that since the Supreme Court had not required exhaustion of administrative remedies and, in fact, had rejected the requirement without qualification,[86] the majority had misconstrued controlling Supreme Court decisions.[87] Furthermore, Judges Rubin and Hatchett pointed out that since there were important policy and procedural reasons for not requiring exhaustion,[88] lower courts should heed these reasons until the Supreme Court should otherwise decree.[89] Judge Hatchett concluded that since the requirement of exhaustion would thwart one of the congressional purposes of section 1983, which was to provide an independent federal remedy,[90] and since exhaustion could produce a "chilling effect" on civil rights litigation, exhaustion should not be required.[91]

The effect of the decision in *Patsy* is difficult to predict. The Court has implied on several occasions that exhaustion of state administrative remedies is mandatory in certain cases.[92] On the other hand, the Court has been reluctant to apply the exhaustion requirement[93] or to provide guidelines for its application.[94]

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[86] The dissent found that *Damico v. California*, 389 U.S. 416 (1967), had erased any doubts that exhaustion was not required in § 1983 cases. 634 F.2d at 920 (Hatchett, J., dissenting). *See* notes 40 through 44 and accompanying text *supra*.

[87] 634 F.2d at 914, 916 (Rubin, Kravitch & Hatchett, JJ., dissenting).

[88] The reasons articulated in Judge Hatchett's dissent were: (1) the Supreme Court has continually followed the no-exhaustion rule; (2) since Congress has not explicitly required exhaustion in § 1983 cases, as it has in cases under other statutes, Congress does not intend that there be an exhaustion requirement under § 1983; (3) where federal issues are involved, administrative agencies have no expertise; (4) the delay involved in requiring exhaustion may discourage some individuals from seeking vindication of their rights; (5) presumably, the statute of limitations may be tolled while administrative remedies are being exhausted, thereby prohibiting the plaintiff from seeking relief; (6) even where the litigant prevails in a state administrative process, he will need to return to federal court for an award of costs and attorney's fees; (7) class action suits cannot be entertained adequately in most administrative procedures; and (8) regarding comity and federalism, postulated by the majority as a reason for requiring exhaustion, the dissent reasoned that federal/state friction can only increase when federal courts are required to judge the adequacy of state administrative remedies. *Id.* at 924-26 (Hatchett, J., dissenting).

[89] *Id.* at 915, 916, 917 (Rubin & Hatchett, JJ., dissenting).

[90] *Id.* at 919 (Hatchett, J., dissenting).

[91] *Id.* at 916-17 (Hatchett, J., dissenting).

[92] *See* notes 47 through 64 and accompanying text *supra*.

[93] *Id.*

[94] Although the Court has hinted that exhaustion may be required in appropriate cases, it has yet to specifically define "an appropriate case." In *McNeese v. Board of Educ.*, *Gibson v. Berryhill*, and *Barry v. Barchi* the Court qualified its holdings, but in other cases, such as *Damico v. California*, Wilwording v. Swenson, 404 U.S. 249, 251-52

One reason for the Court's reluctance to require exhaustion is found in the purposes underlying section 1983.[95] Congress intended section 1983 to be a federal remedy for infringement of federal rights by the states.[96] This purpose is defeated by the requirement that a plaintiff exhaust his state administrative remedies, because in so doing the state may impede the vindication of the individual's civil rights. The Court, nevertheless, has not abolished the requirement. The probable rationale is two-fold: first, the requirement is firmly established by prior case law,[97] and second, there are some situations in which exhaustion is an appropriate procedural requirement. For example, exhaustion seems appropriate in those cases where an individual is not confronted with a present deprivation of his rights, the administrative remedy is adequate, and the individual will not suffer irreparable harm.[98] Another situation in which exhaustion should be required is when issues of state law are involved, and exhaustion would aid in disentangling state administrative issues from federal issues.[99] Finally, exhaustion should be required when the plaintiff avails himself of section 1983 merely to avoid exhaustion under some other statute.[100]

Concededly, the majority opinion is consistent with the second and third purposes of the Civil Rights Act, to provide a federal remedy where the state remedy is inadequate.[101] The state, however, is not the only party in interest, and there are important policy reasons behind the Court's reluctance to require exhaustion broadly. For example, the delay precipitated by exhaustion of administrative remedies[102] could

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(1971) (per curiam), and Zwickler v. Koota, 389 U.S. 241, 248 (1967), the Court merely stated that exhaustion was not required. *See* notes 43, 46 and text accompanying notes 39, 59 and 64 *supra*. *See also* K. DAVIS, *supra* note 14, at § 20.02.

[95] *See* note 8 *supra*.

[96] *See* Comment, *supra* note 18, at 552-54 (the legislative intent behind § 1983).

[97] *See* note 23 and accompanying text *supra*.

[98] *See* Note, *supra* note 12, at 589 (discussing the few reasons for requiring exhaustion).

[99] *Id.* This should be discretionary with the court. The court may determine that it is capable of separating these issues easily and that agency determinations on these issues do not justify the delay inherent in exhaustion.

Abstention should be the remedy when a state statute or rule of state law is so closely involved that the federal court must defer to the state to decide an unsettled question of state law. Abstention is concerned, however, with exhaustion of judicial remedies. *See generally*, Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 HARV. L. REV. 604 (1967) (discussion of abstention in general).

[100] Note, *supra* note 12, at 589. *See* notes 47 through 54 and accompanying text *supra*.

[101] 634 F.2d at 911.

[102] As the dissent pointed out, administrative procedures are not always simple and

discourage potential litigants from seeking relief. In fact, in *Damico*,[103] exhaustion would have necessitated an intolerable delay for welfare recipients, who depend upon the government for survival.[104] A second policy consideration is that section 1983 actions usually involve at least some issues of federal law which should be resolved by the federal courts rather than by state administrative agencies.[105] In addition, consideration must be given to the strong federal interest in prompt redress of grievances. This interest is especially great where class litigation is involved.[106]

One policy consideration often cited by proponents of exhaustion is the need to prevent the overburdening of federal court dockets.[107] In seeking to limit federal jurisdiction, however, proponents of exhaustion often lose sight of the purpose of section 1983, which is to provide the civil rights litigant with a forum for fair redress of grievances, without regard to the size of the federal court docket.[108]

A no-exhaustion rule would also facilitate greater unformity throughout the judicial system for the protection of federal rights.[109]

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expedient. For example, Georgia Patsy is now required to seek a determination in the state court that the administrative remedy is adequate. She must go through the Florida International University (FIU) career service employee grievance procedure, and if she receives an adverse ruling, she must then apply to the Florida Human Relations Commission (HRC) under procedures outlined in the Florida Administrative Code.

Under the FIU career service employee grievance procedure, Patsy is required to appeal to her superior and other FIU personnel. If the FIU personnel do not follow the appropriate procedural outline, Patsy may then appeal to the Florida Director of Personnel in the Department of Administration. The Director may request that the FIU personnel comply with the procedure, but he lacks authority to enforce this request, so Patsy is remediless if FIU personnel refuse to comply.

Upon an unfavorable ruling by FIU personnel, Patsy may reappeal to the Director, but only if she alleges that the procedural outline was not followed. The Director may then issue a final decision although he lacks authority to enforce it.

If Patsy is not satisfied with the FIU personnel ruling or the decision of the Director, she may then appeal to the HRC. This process not only may be time consuming, but the HRC also lacks enforcement authority. In order to enforce its decision, the HRC must appeal to the state court and then appeal any unfavorable ruling. *Id.* at 924-25 n.7 (Hatchett, J., dissenting).

[103] *See* notes 40 through 44 and accompanying text *supra*.

[104] *See* Note, *Federal Judicial Review of State Welfare Practices*, 67 COLUM. L. REV. 84, 105-06 (discussion of dependency of welfare recipients versus delay in the judicial process).

[105] *See* Comment, *supra* note 44, at 1208.

[106] *See id.* at 1208-09.

[107] *See* Note, *supra* note 13, at 1509.

[108] *See* Comment, *supra* note 18, at 551.

[109] *See* Note, *supra* note 12, at 588. For example, a plaintiff in one state may be

Where determinations are made by many administrative agencies, inconsistencies result.[110] Moreover, federal judges are not as prone to compromise an individual's civil rights when they conflict with a state statute or administrative regulation.[111] Finally, since administrative determinations technically do not have a res judicata effect,[112] and the federal court has original jurisdiction over section 1983 claims,[113] the federal court is in no way bound by administrative findings, even if the determinations are correct.[114] Therefore, exhaustion, even in appropriate cases, at best may have the effect of merely postponing judicial relief.[115] At worst, a biased finder of fact at the administrative level may negate a bona fide claim, since a trial de novo may not always be granted after a factual determination has been made by an administrative agency.

The dissenting Justices' conclusion that the *Patsy* majority has misconstrued Supreme Court decisions is not without merit. For example, the majority points out that in *McNeese*, exhaustion was not required because the administrative remedy was inadequate; therefore, the case fell into an exception to exhaustion.[116] While this conclusion is true, the majority ignores the fact that their decision is inconsistent with *McNeese* since *McNeese* requires the state to prove the adequacy of administrative remedies; if any defect exists, then exhaustion is not required.[117] The administrative remedy which the Fifth Circuit now requires Patsy to exhaust contains the same defects as the remedy found inadequate in *McNeese*.[118] Furthermore, the majority ignores the

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asserting the same claim as a plaintiff in another state, but one may be granted judicial relief because the particular administrative remedy is inadequate or falls under one of the other exceptions, while the second plaintiff is denied relief. Even if both remedies were adequate, different results might be reached by the agencies. This hypothetical problem is limited, of course, to situations in which the factual determinations are not confined to the particular plaintiff.

[110] *Id.*

[111] *Id.*

[112] *See* note 18 *supra.*

[113] *See* note 1 *supra.*

[114] Technically this is true. Usually, however, when a federal administrative agency makes the determination, it is upheld by the court if it is "reasonable," even if the court would have reached a different decision on judgment de novo. Comment, *supra* note 18, at 552.

[115] *Id.* at 551.

[116] *See* note 39 and accompanying text *supra.*

[117] 373 U.S. at 674-76.

[118] *See* note 102 *supra. McNeese* held inadequate an administrative remedy in which the official, at the conclusion of the administrative proceedings, was unable to grant relief, thus requiring the complainant to petition the state court for relief. 373 U.S.

Preiser decision in which the Court clearly states that exhaustion is not required in section 1983 cases.[119]

The majority also ignores the recent Congressional enactment of an exhaustion requirement directed toward a limited category of section 1983 cases.[120] The imposition of a broad exhaustion requirement in the face of this enactment has the effect of usurping a policy role which belongs solely to Congress.[121]

Section 1983 was intended to be an independent federal remedy for civil rights litigants, and section 1983 exhaustion is more of a comity and federalism principle than a jurisdictional requirement.[122] The imposition of a broad exhaustion requirement places unnecessary procedural hurdles in the path of the civil rights litigant. Although there are instances in which exhaustion is appropriate,[123] a general rule of exhaustion requires the litigant to exhaust his administrative remedies or forego a judicial remedy. This is the dilemma which Patsy now faces.[124] A more appropriate remedy would have been to allow Patsy to sue in federal court without the necessity of exhausting her administrative remedies. Instead, if the case did not fall within an exception, the majority decision not only required Patsy to exhaust these remedies, but also established guidelines for exhaustion, which the Supreme Court has been hesitant to do.[125] While an affirmance by the Supreme Court would serve to clear some of the confusion surrounding exhaustion in section 1983 cases,[126] the effect of such a decision on the civil rights litigant could be devastating.

H. Camilla Emanuel

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at 675.

[119] *See* notes 50 through 54 and accompanying text *supra.*

[120] *See* 42 U.S.C. § 1997e (Supp. 1980) (Civil Rights of Institutionalized Persons Act requires exhaustion of administrative remedies in all § 1983 actions brought by adult convicted of crime confined to any jail, prison, or other correctional facility).

[121] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc., 421 U.S. 240, 269 (1975) (the judicial imposition of a broad exhaustion requirement for § 1983 cases usurps "the policy role that Congress has reserved for itself").

[122] 634 F.2d at 923-24 (Hatchett, J., dissenting).

[123] *See* notes 98 through 100 and accompanying text *supra.*

[124] *See* note 102 *supra.*

[125] *See* notes 34 through 64 and accompanying text *supra.*

[126] Not only has the Supreme Court's treatment of exhaustion in § 1983 cases been confusing, but various authors have attempted to second guess the Court and have suggested guidelines for determining when exhaustion should be required. *E.g.*, Comment, *supra* note 44, at 1208-09; Comment, *supra* note 18, at 554-55; Note, *supra* note 13, at 1507-08.

TORTS—NEGLIGENCE—THE SUDDEN EMERGENCY DOCTRINE IS ABOLISHED IN MISSISSIPPI

Plaintiff, a passenger in defendant's vehicle, brought an action to recover damages for injuries sustained in a motor vehicle accident which was allegedly the result of defendant's negligence.[1] In the face of sharply conflicting testimony regarding the circumstances surrounding the accident,[2] the defendant was granted a sudden emergency instruction.[3] A jury trial in the Circuit Court of Jackson County resulted in a verdict for the defendant. Plaintiff appealed, assigning several errors, including the lower court's granting of the sudden emergency instruction.[4] On appeal, the Mississippi Supreme Court *held*, reversed. The doctrine of sudden emergency is abolished in Mississippi, and the use of the words "sudden emergency" in jury instructions is hereafter prohibited. *Knapp v. Stanford,* 392 So. 2d 196 (Miss. 1980).

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[1] Knapp v. Stanford, 392 So. 2d 196, 196 (Miss. 1980). The accident occurred December 31, 1977 on U.S. Highway 90 near Pascagoula, Mississippi. The plaintiff, Robert Knapp, was seated on the rear seat of a "Blazer" owned and operated by the defendant, James B. Stanford. *Id.*

[2] Defendant testified he was driving on the proper side of the road at a reasonable speed when an oncoming vehicle moved into his lane of traffic, forcing him to move off the road and down onto the right shoulder. *Id.* at 197. The right wheels of his car remained on the shoulder, which was very uneven and bumpy, for two to four seconds. When he attempted to steer his car back onto the road, the tires caught on the edge of the pavement, which was, in places, six to eight inches higher than the shoulder, and his car went into a spin and flipped over. *Id.* at 200-01 (Walker, J., dissenting).

Plaintiff testified the vehicle was being operated at a high rate of speed; the defendant told him a few seconds before the accident occurred that they were traveling approximately 90 to 95 miles per hour. Furthermore, he did not see another vehicle on the roadway. *Id.* at 197.

[3] *Id.* at 197. The lower court's instruction read as follows:

> The court instructs the jury that under the law when a person is confronted with a sudden emergency not of his own making and is by reason thereof placed in a position of peril to himself without sufficient time in which to determine with certainty the best thing to do, he is not held to the same accuracy of judgment as is required of him under ordinary circumstances, and in this case if you believe from a preponderance of the evidence, that James B. Stanford, immediately prior to the accident in question, was driving his vehicle on his right side of the road, at a reasonable rate of speed and he was suddenly, without warning, confronted with the vehicle driven by persons unknown within James Stanford's lane of traffic and that the presence of the other vehicle constituted a sudden emergency which was not of a making of the defendant, James B. Stanford, and if you further find from a preponderance of the evidence that after having been confronted with such sudden emergency, if any, the defendant, James B. Stanford, used the same degree of care that a reasonably prudent automobile driver would have used under the same or similar unusual circumstances, if any, but was unable to avoid the accident giving rise to this lawsuit, then the defendant, James B. Stanford, was not guilty of negligence which proximately caused the collision in question, and in that event, it would be your sworn duty to return a verdict for the defendant, James B. Stanford.

The sudden emergency doctrine[5] is a nonstatutory principle under which the law recognizes that a person suddenly and unexpectedly placed in a position of impending peril usually will not, and should not be expected to, exercise the judgment and discretion of a person acting under normal circumstances.[6] Because of its common sense approach, the doctrine is applicable to a variety of emergency situations.[7] However, the most common use of the rule has been in the context of injury claims resulting from motor vehicle accidents.[8]

The doctrine originated in England, where the 1816 decision in *Jones v. Boyce*[9] first set forth its elements as they are known today. Less than twenty-five years later, the United States Supreme Court, in *Stokes v. Saltonstall,*[10] endorsed an instruction[11] based on *Jones* and thus brought the sudden emergency doctrine into prominence in this country. Each decision involved an action against an owner or operator

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Id. (quoting the lower court's instruction).

[4] *Id.* at 196. The court held that only one of the assigned errors, the granting of the sudden emergency instruction, had merit, and restricted its opinion to that issue alone. *Id.*

[5] The sudden emergency doctrine is known by a variety of names: the doctrine of sudden peril, Hormovitis v. Mutual Lumber Co., 120 So. 2d 42, 45 (Fla. Dist. Ct. App. 1960); the sudden danger doctrine, Reese v. Buhle, 16 Ill. App. 2d 13, 147 N.E.2d 431, 435 (1957); the doctrine of imminent peril, Dreyfus v. Mississippi City Lines, Inc. 261 So. 2d 786, 789 (Miss. 1972); and the emergency rule, Hoehne v. Mittelstadt, 252 Wis. 170, 31 N.W.2d 150, 152 (1947).

[6] *See* Peel v. Gulf Transp. Co., 252 Miss. 797, 815-16, 174 So. 2d 377, 385 (1965) (definition of the sudden emergency doctrine); Comment, *The Sudden Emergency Doctrine,* 36 MISS. L.J. 392, 392 (1965) (same).

[7] *E.g.*, United States v. Jasper, 222 F.2d 632, 633 (4th Cir. 1955) (military policeman threatened by angry mob not negligent in firing pistol); Elmore v. Des Moines City Ry., 207 Iowa 862, 224 N.W. 28, 29, 31 (1929) (plaintiff dragged while holding bumper of defendant's bus not contributorily negligent); Barnhardt v. American Glycerine Co., 113 Kan. 136, 213 P. 663, 665 (1923) (driver abandoning burning car loaded with nitroglycerine without first securing the brakes not negligent).

[8] *See* Note, *The Sudden Emergency Doctrine in Florida,* 21 U. FLA. L. REV. 667, 667 (1969).

[9] 171 Eng. Rep. 540 (N.P. 1816). *See generally* Comment, *supra* note 6, at 393-95 (discussing the history of the sudden emergency doctrine).

[10] 38 U.S. (13 Pet.) 181 (1839).

[11] *Id.* at 191.

of a coach for injuries received when the plaintiff was forced to jump from the coach to avoid injury due to the defendant's reckless and negligent operation of the coach. In each instance, the plaintiff successfully utilized the doctrine to avoid a charge of contributory negligence.[12] It was to this end that the doctrine was most often employed in its early history.[13] Today, however, the sudden emergency doctrine is frequently invoked by a defendant to counter a charge of primary negligence. This has been true in an overwhelming majority of Mississippi cases reported during the past twenty-five years.[14]

While many of the early cases applying the doctrine emphasized the necessity of excusing an actor's "instinctive" reaction to an emergency situation,[15] today's courts no longer require the reference to instinct,[16] emphasizing instead that the actor is placed in a situation in which the normal options of reasonable conduct are unavailable.[17] The doctrine applies even though in retrospect it becomes clear that the actor's decision was wrong, and was in fact one which no reasonable person, given ample time for reflection, would have considered.[18]

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[12] *Id.*; 171 Eng. Rep. at 540.

[13] *See* Comment, *supra* note 6, at 394 (use of sudden emergency doctrine important because contributory negligence of plaintiff would bar recovery).

[14] A survey of 40 cases appealed to the Mississippi Supreme Court since 1955 involving some aspect of the sudden emergency doctrine revealed that a plaintiff sought to invoke the doctrine in only six cases: Gates Rubber Co. v. Duke, 367 So. 2d 910, 912-13 (Miss. 1979); Hill v. Acord, 259 So. 2d 472, 473 (Miss. 1972); Acord v. Moore, 243 So. 2d 55, 58 (Miss. 1971); Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 663, 182 So. 2d 228, 230 (1966); Gulf, M. & O. R.R. v. Withers, 247 Miss. 123, 131-33, 154 So. 2d 157, 159 (1963); Majure v. Herrington, 243 Miss. 692, 699-700, 139 So. 2d 635, 638 (1962). On a national basis, this imbalance does not exist. One reason for this difference may be that in some states, contributory negligence is a complete bar to the plaintiff's recovery, while the Mississippi comparative negligence statute allows apportionment of damages. Comment, *supra* note 6, at 394-95.

[15] *E.g.*, Whicher v. Phinney, 124 F.2d 929, 931 (1st Cir. 1942) (where defendant had only two seconds to avoid person in road, defendant's instinctive action did not render him negligent).

[16] *See* Evans, *The Standard of Care in Emergencies*, 31 KY. L.J. 207, 217-18 (1943) (change from instinctiveness requirement marks development in law of sudden emergency); Note, *supra* note 8, at 667-68 (reference to impulse or instinct is unnecessary to justify court's use of the emergency doctrine).

[17] Majure v. Herrington, 243 Miss. 692, 699, 139 So. 2d 635, 638 (1962) (quoting 60 C.J.S. *Motor Vehicles* § 257(a)(1969)); *see* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 33, at 169 (4th ed. 1971) (excited actor must make a speedy decision based largely upon impulse).

[18] RESTATEMENT (SECOND) OF TORTS § 296, Comment b, at 64-65 (1965); *see* Kane v. Worcester Consol. St. Ry., 182 Mass. 201, 65 N.E. 54, 54 (1902) (action may be mistaken and yet prudent).

Although the sudden emergency doctrine makes allowances for the imperfections of human behavior, it is subject to significant limitations which serve to restrict its general application. Of paramount importance is the fact that the doctrine does not provide for a different standard of care in an emergency than in any other situation.[19] In order to avoid negligence in any circumstance, the actor must conduct himself as would a reasonable and prudent person under the same or similar circumstances,[20] and he may still be found negligent, despite the emergency, if his actions are deemed to be unreasonable.[21] By way of further limitation, most states have promulgated rules which set forth conditions that must be met before an actor is entitled to a jury instruction based on the sudden emergency doctrine. The following conditions are a representative sample:[22] there must have been an actual or apparent emergency;[23] the emergency must not have been reasonably anticipated;[24] the actor must have been aware of the emergency;[25] it must not have been created by his own negligent or wrongful conduct;[26] he must have had alternative courses of action from which to choose;[27] and he must have been required to act instantly, without time for reflection or the exercise of discretion.[28] Ideally, these conditions, coupled with the requirement of reasonableness under the circumstances, operate as a check against indiscriminate use of the doctrine.

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[19] Dean v. Travelers Ins. Co., 171 So. 2d 708, 709 (Ct. App. La. 1965) (sudden emergency language does not modify the standard tests of negligence); Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 42, 50 So. 2d 902, 905 (1951) (emergency doctrine is not an exception to the general rule requiring reasonable care).

[20] Dean v. Travelers Ins. Co., 171 So. 2d 708, 708-09 (Ct. App. La. 1965) (reference to sudden emergency merely serves to emphasize "under the circumstances"); Zillmer v. Miglautsch, 35 Wis. 2d 691, 151 N.W. 2d 741, 748 (1967) (reasonable and prudent person test is applicable before, during, and after the emergency).

[21] W. PROSSER, *supra* note 17, at 169; *see, e.g.,* Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 13, 108 So. 2d 409, 414 (1959) (whether driver's actions after vehicle's brake failure were reasonable is a jury question).

[22] The individual elements of the sudden emergency doctrine are discussed in Wise, *The Sudden Emergency Doctrine As Applied in South Carolina,* 20 S.C.L. REV. 408, 409-15 (1968) and Comment, *supra* note 6, at 393, 396-404.

[23] *See, e.g.,* Squires v. McLaughlin, 44 Wash. 2d 43, 265 P.2d 265, 268-69 (1953) (lunging for bottle of vodka on car seat does not constitute a sudden emergency).

[24] W. PROSSER, *supra* note 17, at 170 (some emergencies must be anticipated, and when actor engages in an activity in which they are likely to occur, he must be prepared to meet them); *see, e.g.,* Potts v. Krey, 362 S.W.2d 726, 727 (Ky. 1962) (failure to anticipate child darting into vehicle's path); May v. Pace, 197 So. 2d 220, 222 (Miss. 1967) (failure to anticipate sudden stop of car).

[25] *See, e.g.,* Hanson v. Matas, 212 Wis. 275, 249 N.W. 505, 506 (1933) (deaf man who turned toward truck which then hit him from behind acted without being aware that he was in an emergency).

[26] *See, e.g.,* Mercier v. Davis, 234 So. 2d 902, 904 (Miss. 1970) (sudden emergency instruction unavailable because driver following too closely); Ladner v. Merchants Bank & Trust Co., 251 Miss. 804, 815-17, 171 So. 2d 503, 508-09 (1965) (unavailable because of driver's excessive speed).

The lower courts in Mississippi applying the sudden emergency doctrine have experienced confusion in two areas. First, the courts have encountered difficulty in determining when the circumstances of a case justify application of the doctrine.[29] In the case of *Vann v. Tankersly,*[30] the sudden emergency doctrine was first applied in a Mississippi negligence case. The defendant in *Vann,* while attempting to prevent his wife from falling out of the right side of his car, lost control of the automobile and injured a bystander.[31] In reversing a jury verdict finding the defendant guilty of negligence, the court held that his actions in light of the extraordinary situation were understandable, and since he did not contribute to the emergency, his conduct was not negligent.[32] In later cases, the Mississippi Supreme Court considered further the question raised in *Vann* of whether an emergency sufficient to invoke the doctrine of sudden emergency actually existed.[33] Other conditions for a proper sudden emergency situation in Mississippi were developed in decisions rendered subsequent to *Vann*[34] and track very closely those found in the majority of other states.[35]

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[27] *See, e.g.,* Frangos v. Edmunds, 179 Or. 577, 173 P.2d 596, 610 (1946) (driver was refused sudden emergency instruction because only alternative was to apply brakes).

[28] Jones v. Dixie Greyhound Lines, Inc., 211 Miss. 34, 45, 50 So. 2d 902, 906 (1951) (quoting W. PROSSER, HANDBOOK OF THE LAW OF TORTS 242-43 (1941)).

[29] Mississippi Supreme Court cases considering the appropriateness of lower court applications of the sudden emergency doctrine can be conveniently grouped as follows: (1) cases in which the instruction was improperly granted because the wrongful conduct of the party seeking to invoke the rule proximately caused or contributed to the emergency, *see, e.g.,* Wood v. Walley, 352 So. 2d 1083, 1086-87 (Miss. 1977) (following too closely); Peavy v. Alexander, 308 So. 2d 65, 68 (Miss. 1975) (excessive speed); Bozeman v. Tucker, 203 So. 2d 795, 797 (Miss. 1967) (failure to slow down to avoid cows in road); (2) cases in which the instruction was improperly granted because the party either had reason to expect the emergency situation or had sufficient opportunity once the emergency arose for the exercise of judgment and discretion, *see, e.g.,* Gates Rubber Co. v. Duke, 367 So. 2d 910, 912 (Miss. 1979) (products liability suit); Nielson v. Miller, 259 So. 2d 702, 704 (Miss. 1972) (driver could have applied emergency brake when regular brakes failed); Pullin v. Nabors, 240 Miss. 864, 873-74, 128 So. 2d 117, 120-21 (1961) (flashing light provided sufficient warning); (3) cases in which the court found the lower court to have correctly granted or denied a sudden emergency instruction in view of the facts surrounding the accident, *see, e.g.,* Graves v. Hart's Bakery, Inc., 241 So. 2d 673, 674-75 (Miss. 1970) (car weaving across road); Young v. Schwarz, 230 So. 2d 583, 585 (Miss. 1970) (children running into street); Young v. Cameron, 203 So. 2d 315, 316 (Miss. 1967) (car crossing road in front of driver).

[30] 164 Miss. 748, 145 So. 642 (1933). For cases leading up to the court's holding in *Vann,* see Rhodes v. Fullilove, 161 Miss. 41, 49, 134 So. 840, 843 (1931) (wisdom of plaintiff's actions is not to be judged in retrospect, but under circumstances existing at the time); Mississippi Power & Light Co. v. Sumner Gin Co., 156 Miss. 830, 840, 127 So. 284, 286 (1930) (question of negligence must be considered in light of what an ordinary and prudent man would do or fail to do in similar circumstances).

[31] 164 Miss. at 752-53, 145 So. at 643.

The second area of confusion results from the failure of judges to determine when a sudden emergency instruction inaccurately or inadequately states the applicable law.[36] In *Gulf, Mobile & Ohio Railroad v. Withers,*[37] the court set forth three essential elements which must be incorporated into such an instruction. First, the instruction must point out that the party invoking the doctrine used reasonable care before the emergency arose, and that the emergency was not one of his own creation. Second, the instruction must define and briefly describe the sudden emergency and must state the facts that would permit the jury to determine whether a sudden emergency actually existed. Finally, the jury should be instructed that, after the emergency arose, the actor must have exercised such care as a reasonably prudent and careful person (or capable driver) would use under the circumstances.[38]

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[32] *Id.* at 756-59, 145 So. at 644-45.

[33] *See, e.g.,* Saucier v. Talkington, 251 Miss. 519, 527-28, 170 So. 2d 434, 437 (1965) (child darting across street); Majure v. Herrington, 243 Miss. 692, 700, 139 So. 2d 635, 639 (1962) (car coming over crest of hill in wrong lane); Phillips v. Delta Motor Lines, Inc., 235 Miss. 1, 13-14, 108 So. 2d 409, 414 (1959) (brake failure).

[34] The requirements a party had to meet before a Mississippi court could grant a motion for a sudden emergency instruction were summarized in Wood v. Walley, 352 So. 2d 1083 (Miss. 1977):

> (1) The motorist seeking the instruction must be driving in a reasonable and prudent manner; (2) the driver must be suddenly confronted with an unexpected and sudden emergency; (3) the emergency cannot be created or contributed to by the negligence or the wrongful conduct of the driver claiming the benefit of the rule; (4) the driver must be placed in a position of peril to himself; (5) the driver cannot have sufficient time in which to determine by rational deliberation the best alternative; (6) and the degree of care to be weighed by the jury under the said emergency doctrine is that which a reasonably prudent and capable driver would use under the "unusual" circumstances brought about by the sudden emergency.

Id. at 1086-87. *See* Peel v. Gulf Transp. Co., 252 Miss. 797, 813-16, 174 So. 2d 377, 384-85 (1965) (driver must not have been negligent and must not have had time for rational deliberation of alternatives); Majure v. Herrington, 243 Miss. 692, 699, 139 So. 2d 635, 638 (1962) (driver must be proceeding in reasonable manner when confronted with unexpected emergency); Moore v. Taggart, 223 Miss. 389, 402, 102 So. 2d 333, 337 (1958) (degree of care is that which would be exercised by reasonable and prudent driver).

[35] *See* notes 22 through 28 and accompanying text *supra.*

[36] *See, e.g.,* Dreyfus v. Mississippi City Lines, Inc., 261 So. 2d 786, 789 (Miss. 1972) (definition of emergency not tied to facts of case); Acord v. Moore, 243 So. 2d 55, 58 (Miss. 1971) (essential elements omitted); Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 666, 182 So. 2d 228, 232 (1966) (same). The Mississippi Supreme Court affirmed lower court decisions on the form of the sudden emergency instruction in Hill v. Acord, 259 So. 2d 472, 475 (Miss. 1972) (erroneous instruction properly denied); Saucier v. Talkington, 251 Miss. 519, 527-28, 170 So. 2d 434, 437 (1965) (erroneous form of instruction held harmless error); Phillips v. Dow Chem. Co., 247 Miss. 293, 304-05, 151 So. 2d 199, 203 (1963) (instruction appropriate even though sudden emergency not specifically pleaded); Rushing v. Edwards, 244 Miss. 677, 683-84, 145 So. 2d 695, 697-98 (1962) (ambiguous sudden emergency instruction sufficiently clarified by other instructions).

[37] 247 Miss. 123, 154 So. 2d 157 (1963).

Despite the guidance offered by *Withers* in the formulation of sudden emergency instructions, in subsequent years the Mississippi Supreme Court was forced to reverse a number of lower court decisions because of the failure of the granted instruction to state correctly one or more of the essential elements.[39] This continued difficulty experienced by the lower courts led the court to question, at times, the necessity of granting the instruction at all.[40] In this respect, the Mississippi court joined a number of other courts[41] and legal commentators[42] in voicing dissatisfaction with a separate charge to the jury on the sudden emergency issue. This dissident group contends that ordinary rules of negligence adequately provide for the emergency situation and that a separate instruction on this point is unnecessary and tends to confuse jurors on the real issue of negligence before them.[43] Comments to the model or pattern jury instructions in at least four states, Illinois,[44] Florida,[45] Kansas,[46] and Missouri,[47] now recommend that no sudden emergency instruction be given. However, despite the growing discontent with the sudden emergency instruction and its impact on the unbiased disposition of personal injury claims in negligence cases, no other state court has abolished the doctrine entirely.[48]

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[38] *Id.* at 132-33, 154 So. 2d at 160.

[39] *See* note 36 *supra.*

[40] *See, e.g.,* Young v. Schwarz, 230 So. 2d 583, 585 (Miss. 1970) (questioned whether sudden emergency instruction was ever properly given, but continued adherence to the doctrine).

[41] For example, in Finley v. Wiley, 103 N.J. Super. 95, 246 A.2d 715 (1968), the court stated:

> [W]e entertain grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile accident case.
>
> . . . The ordinary rules of negligence were applicable and afforded a sufficient gauge by which to appraise his [defendant's] conduct . . . . The giving of the additional charge tended to be argumentative in its effect and served to unduly emphasize one phase of the proofs. We are satisfied that it played a significant part in the jury's finding of no negligence, and in the denial of justice which resulted.

246 A.2d at 719. Additional cases are cited at note 43 *infra.*

[42] *See, e.g.,* Green, *The Submission of Issues in Negligence Cases,* 18 U. MIAMI L. REV. 30, 43 & n.42 (1963) (current appellate court reports reflect the courts' struggle with negative aspects of the negligence issue); Reynolds, *Put Yourself in an Emergency—How Will You Be Judged?,* 62 KY. L.J. 366, 375 (1974) (no reason for departing from general custom of instructing jury to consider all circumstances and to determine reasonableness of actor's conduct in light of such facts); Thode, *Imminent Peril and Emergency in Texas,* 40 TEX. L. REV. 441, 446 (1962) (no logical or legal justification for "emergency issues"; submitting issue to jury in this form leads to many difficulties).

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[43] *See* Massotto v. Public Serv. Coordinated Transp., 71 N.J. Super. 39, 176 A.2d 280, 285-86 (Super. Ct. App. Div. 1961) (modern view is that separate charge on sudden emergency is unnecessary, confusing, and should be eliminated); Wietzel v. Wingard, 274 Or. 185, 546 P.2d 121, 135 (1976) (Tongue, J., dissenting) (vice of emergency instruction is that it gives a party a "double shot" on the issue of whether conduct was sufficient to satisfy duty to exercise reasonable care); Ballard v. Rickabaugh Orchards, Inc., 259 Or. 200, 485 P.2d 1080, 1083 (1971) (emergency instruction is unnecessary and should be avoided); Wiehl, *Instructing a Jury in Washington,* 36 WASH. L. REV. 378, 383 (1961) (in view of potential problem of overemphasis, trial court should consider refusing to give sudden emergency instruction since regular instructions on negligence usually cover area sufficiently); Comment, *Justice v. Harrison: The Emergency Doctrine,* 3 OKLA. CITY U.L. REV. 723, 731 (1979) (emergency doctrine is often inappropriately used and tends to confuse juries and focus attention away from real issues). *See also* RESTATEMENT (SECOND) OF TORTS § 283, Comment c at 12-13 (1965) (traditional reasonable man standard provides sufficient flexibility to permit full consideration of all the circumstances of the case which may affect the required conduct).

The tendency of the sudden emergency instruction to obscure the concept of proximate cause when a jury seeks to resolve the question of an actor's liability is discussed in Ellwood v. Peters, 182 So. 2d 281, 285-86 (Fla. Dist. Ct. App. 1966), and Kline v. Emmele, 204 Kan. 629, 465 P.2d 970, 972-73 (1970). The court in *Kline* pointed out that even where there is definite evidence of negligence on the part of a defendant, the weight of such evidence might well be destroyed by a sudden emergency instruction because the jury might lose sight of, or disregard, the negligence which caused the emergency. 465 P.2d at 973.

[44] ILLINOIS SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, ILLINOIS PATTERN JURY INSTRUCTIONS — CIVIL 12.2 (2d ed. 1971). Three reasons were listed for the recommendation: "First, it is argumentative. Second, it states a simple and obvious fact about human behavior. Third, except in the most obvious case when no juror would need to be reminded of the proposition it will probably lead to reversible error." *Id.* For a case in which an Illinois appellate court relied on this recommendation, see Keel v. Compton, 120 Ill. App. 2d 248, 256 N.E.2d 848, 853 (App. Ct. 1970) (trial court erred in giving sudden emergency instruction).

[45] SUPREME COURT COMMITTEE ON STANDARD JURY INSTRUCTIONS, FLORIDA STANDARD JURY INSTRUCTIONS 4.8 (1974). The section states that: "The Committee recommends that no charge be given on the subject of sudden emergency. In the circumstances of an emergency, as in 'ordinary circumstances,' the applicable standard of care is reasonable care under the circumstances." For a discussion of the significance and impact of this recommendation, see Note, *supra* note 8, at 679-80.

[46] COMMITTEE ON PATTERN JURY INSTRUCTIONS KANSAS DISTRICT JUDGES' ASSOCIATION, PATTERN INSTRUCTIONS FOR KANSAS 8.81 (Supp. 1975). The comment to this section notes that the recommendation is based on the Kansas Supreme Court's criticism of the sudden emergency doctrine in Mesecher v. Cropp, 213 Kan. 695, 518 P.2d 504, 511 (1974), Kline v. Emmele, 204 Kan. 629, 465 P.2d 970, 972 (1970), and Lawrence v. Deemy, 204 Kan. 299, 461 P.2d 770, 774 (1969). It concludes by stating: "The Committee believes there is no valid justification for the continued giving of the instruction. The

In the instant case, the court found that since the sudden emergency allegedly arose because of the errant path of an approaching vehicle,[49] the emergency ended when the appellee successfully avoided that vehicle,[50] and he was no longer excused for his failure to determine the most reasonable method of returning to the roadway.[51] Thus, since the ensuing accident did not result from the sudden emergency, but from appellee's subsequent unreasonable actions,[52] the instruction which he requested on this point was inappropriate, and the action of the trial court in granting the instruction was reversible error.[53] In the second part of the opinion, the court reasoned that since the sudden emergency doctrine often served to confuse the operation of Mississippi's comparative negligence statute,[54] and, further, was often interpreted as requiring an inordinately high standard of proof for a finding of negligence,[55] a wiser policy would be to apply general rules of negli-

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emergency circumstances are a proper matter for argument by counsel." PATTERN INSTRUCTIONS FOR KANSAS, *supra*, 8.81.

[47] MISSOURI SUPREME COURT COMMITTEE ON JURY INSTRUCTIONS, MISSOURI APPROVED JURY INSTRUCTIONS 1.04 (2d ed. 1969). Three reasons were listed for the recommendation: (1) the language is argumentative; (2) the jury has already been instructed that the standard of care is measured by what would be done by others similarly situated; (3) the instruction may cause reversible error when submitted to cover antecedent negligence not in issue." *Id.*

[48] *See* note 63 *infra. See generally* Annot., 80 A.L.R.2d 5 (1961) (review of state court decisions on sudden emergency instructions in automobile cases).

[49] Knapp v. Stanford, 392 So. 2d 196, 197 (Miss. 1980). In considering the validity of the granted instruction, the court assumed that the defendant's testimony, *see* note 2 *supra*, was truthful. *Id.* at 197.

[50] *Id.* at 198. Although the distance the vehicle traveled while partially off the road was disputed, the court concluded it was "clear" the sudden emergency was over and that either the manner in which the driver steered the vehicle back onto the road, the vehicle's speed, or the interaction of the wheels and the raised road surface was the sole cause of the accident. *Id.* at 197-98.

[51] *Id.* at 198.

[52] *See* notes 50, 51 and accompanying text *supra*.

[53] 392 So. 2d at 198.

[54] *Id.*; *see, e.g.*, Peel v. Gulf Transp. Co., 252 Miss. 797, 816-17, 174 So. 2d 377, 386 (1965) (instruction raised erroneous inference as to defendant's potential negligence); Rivers v. Turner, 223 Miss. 673, 680, 78 So. 2d 903, 906 (1955) (instruction which failed to take comparative negligence statute into account was misleading and erroneous).

[55] 392 So. 2d at 198.

gence to all situations.[56] The court concluded by asserting its belief that, since negligence cases could be most efficiently handled by applying uniform principles of negligence in all circumstances,[57] the sudden emergency instruction should be discarded, allowing the jury to consider only what a reasonable and prudent person would have done under the circumstances.[58]

In a strongly worded dissent, Justice Walker, joined by three other justices,[59] argued that since the appellee had been forced from the roadway through no fault of his own, and since he remained in a dangerous and difficult position during the entire time that he was off the road, the entire sequence of events, and not just the initial encounter with the approaching vehicle, constituted the sudden emergency,[60] and this fact justified the granting of a proper[61] sudden emergency instruction.[62] Justice Walker reasoned further that since the Mississippi Supreme Court had developed relatively clear cut and easy to follow rules on the sudden emergency question,[63] and since the test that the majority imposed for future use was essentially the same as that used in the past, then the majority's abrogation of the doctrine was unwarranted and, further, would result in more confusion than the doctrine itself.[64]

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[56] *Id.* at 199; *see* notes 41 through 43 *supra.*

[57] 392 So. 2d at 199.

[58] *Id.*

[59] Justices Smith, Robertson, and Cofer joined in the dissent. *Id.* at 202 (Walker, J., dissenting). In addition, Justice Smith filed a separate dissent in which he objected to the declaratory and anticipatory nature of the majority's action in rendering a decision abolishing a doctrine while simultaneously claiming that the doctrine in no way controlled the instant case. *Id.* at 199-200 (Smith, J., dissenting).

[60] *Id.* at 200-01 (Walker, J., dissenting). The dissent emphasized the defendant's description of the difficulties he faced after being forced off the road by the approaching vehicle. This testimony, according to the dissent, established that the sudden emergency was not over. *Id.* "At the very least the evidence presented a classic question for the jury." *Id.* at 200; *see, e.g.,* Continental S. Lines, Inc. v. Lum, 254 Miss. 655, 665, 182 So. 2d 228, 231 (1966) (when there exists a question of fact, the issue of sudden emergency is properly submitted to the jury); Lum v. Jackson Indus. Uniform Serv., Inc., 253 Miss. 342, 348-50, 175 So. 2d 501, 503-04 (1965) (unless negligence of defendant is established as a matter of law, then question of sudden emergency is for jury to decide); Rushing v. Edwards, 244 Miss. 677, 684, 145 So. 2d 695, 698 (1962) (question of whether sudden emergency was created through negligence of defendant was issue of fact for jury).

[61] Although Justice Walker found that a sudden emergency instruction should have been granted, he concluded that the lower court's wording of the instruction was erroneous because it was not sufficiently tied to the evidence and, thus, did not provide a proper guideline for the jury to use in making its decision. Accordingly, Justice Walker voted to reverse the lower court decision. 392 So. 2d at 202; *see* Dreyfus v. Mississippi City Lines, 261 So. 2d 786, 789 (Miss. 1972) (instruction which gave the legal definition of sudden emergency but which did not relate it to facts shown by testimony held erroneous); MISSISSIPPI CIRCUIT COURT JUDGES' ASSOCIATION & MISSISSIPPI JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS 36.11 (1977) (sudden emergency instruction should "state facts constituting the alleged sudden emergency").

[62] 392 So. 2d at 201.

In light of the court's increasing dissatisfaction with the operation and application of the sudden emergency doctrine, dramatically illustrated by the high rate of reversal of sudden emergency cases brought on appeal,[65] the court's action in abolishing the doctrine was not completely unexpected. However, considering the sharply conflicting testimony concerning the circumstances of the accident,[66] the majority's action in determining that the sudden emergency had ended, without resorting to the usual procedure of allowing the jury to determine this factual issue, appears to disregard procedures established in the court's previous decisions. It is well established in Mississippi that questions concerning the existence of an actual emergency should be submitted to the jury.[67] Given this requirement, it would seem to follow *a fortiori* that, where the testimony has raised a jury question regarding the existence of an emergency,[68] the question of the duration of the emergency should also properly be for the jury.

The second part of the decision, in which the court prohibited the future application of the doctrine, is the more significant. It will undoubtedly be well received by future plaintiffs and regarded with disfavor by future defendants.[69] Although the test that the court provided for future use[70] is the same standard as formerly employed,[71] the absence of the magical words "sudden emergency" and the corresponding images they create in the minds of jurors will probably affect the way an actor's conduct is judged. This seems to be the effect desired by the court, which, in expressing the view that the sudden emergency doctrine often tended to increase unfairly the plaintiff's burden of proof,[72] sided with other authorities who concluded that the instruction unfairly favors the party invoking it because of the emphasis the doctrine places on the circumstances encountered by that party.[73] Thus, in seeking to simplify the consideration of the negligence question for jurors, the court may also succeed in ensuring unbiased and evenhanded application of justice in cases based on sudden emergency. The role of counsel should now shift from one of emphasizing the words "sudden emergency" to one of stressing the reasonableness of actions under the circumstances. It is inevitable that some confusion will result as attorneys attempt to formulate a new instruction which will place their client's conduct in the best possible light, yet conform to the test set forth in this opinion.[74] However, it is submitted that, despite the unavailability of the actual sudden emergency language, such problems may be mitigated by continued adherence to the basic requirements set forth in *Gulf, Mobile & Ohio Railroad v. Withers.*[75]

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[63] *Id.* at 202; *see* note 34 *supra.* Earlier in his opinion Justice Walker stated that although many courts, including Mississippi, had cautioned against use of the sudden emergency instruction, no other court had abolished the sudden emergency doctrine altogether. 392 So. 2d at 202.

[64] 392 So. 2d at 202. Justice Walker predicted that the abrogation of the doctrine by the majority will leave both the bench and the bar "in the dark trying to devise new instructions with new wording based on new theories which will in my judgment cause more errors and more appeals than we have had in the past." *Id.* He concluded that the court's decision would "create chaos out of what is presently a little confusion." *Id.*

[65] *See* notes 29 and 36 *supra.*

[66] *See* note 2 *supra.*

[67] *See* note 60 *supra.*

[68] For the defendant's testimony on the circumstances leading up to the accident, see note 2 *supra.* According to the dissent, in determining whether a sudden emergency instruction is warranted by the evidence, and thus whether a sudden emergency actually existed, the testimony must be viewed in the light most favorable to the party invoking the doctrine. 392 So. 2d at 200 (Walker, J., dissenting).

[69] Sudden emergency instructions are utilized more frequently by defendants than by plaintiffs. *See* note 14 and accompanying text *supra.*

[70] *See* notes 56 through 58 and accompanying text *supra.*

[71] *See* notes 19 through 21 and accompanying text *supra.*

The decision in the instant case has potential for significance in those jurisdictions which share the Mississippi court's dim view of the sudden emergency doctrine. Indeed, many other state courts have criticized the doctrine in more forceful language than that used by the Mississippi Supreme Court prior to this decision.[76] Accordingly, the prospect of additional courts abrogating the doctrine is not at all unlikely. Other courts seeking to take similar action may point to the fact that the doctrine has, in many instances, proved to be unworkable and counterproductive.[77] It is apparent from any perspective, however, that only the passage of time will allow an accurate appraisal of the court's solution to the difficulties presented by the sudden emergency doctrine.

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[72] *See* text accompanying note 55 *supra.*

[73] *See* notes 41 and 43 *supra.*

[74] *See* note 64 and accompanying text *supra.*

[75] 247 Miss. 123, 132-33, 154 So. 2d 157, 160 (1963). For a discussion of this case, see text accompanying notes 37 and 38 *supra.*

[76] *See* notes 41 and 43 through 47 *supra.*

[77] Compare the language used in the Mississippi and New Jersey decisions quoted at notes 40 and 41 *supra.*

Douglas J. Gunn

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GOOD FAITH PERFORMANCE UNDER PERCENTAGE LEASES

*Richard Thigpen**

I. INTRODUCTION

With the development of the chain store and of marketing techniques which emphasize gross receipts at the expense of profit margins, seasoned real estate investors have shown increased interest in leasing arrangements geared to the performance of the economic enterprise.[1] Retail operators, influenced by the rapidity of social and economic changes and fluctuations in dollar value, also have tended to place less faith in the traditional flat rate leasing system. Both groups have come to realize that as business conditions change, so changes the productivity of the leased premises and of the enterprise conducted thereon. Thus they have turned to another type of agreement, one whereby landlord and tenant share proportionately the returns attributable in part to the demised premises and in part to the business conducted on those premises.[2] This type of lease arrangement is commonly called a percentage lease.

The principle of percentage compensation is not new. It was customary for English feudal lords to require of their serfs a stipulated portion of crops from lands that had been set aside for cultivation.[3] Even in the United States, farm tenants often were required to pay a certain amount of all that was raised on their landlords' fields.[4] In both countries, the sale of minerals and mineral rights has commonly involved a compensation computed on the basis of actual productivity.[5] Today, however, the most extensive use of the percentage technique is in American cities and towns, where the percentage lease has become a leading method for leasing business properties.

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[1] S. McMichael & P. O'Keefe, Leases: Percentage, Short and Long Term 32-33 (5th ed. 1959). This is the major text dealing with percentage rental agreements. However, since McMichael, a realtor and appraiser, was interested in the purely practical aspects of percentage lease financing, one must turn elsewhere for discussions of apposite legal principles. In this regard, see 1 American Law of Property § 3.66, at 320-25 (A.J. Casner ed. 1952); Denz, *Percentage, Cost of Living and Revaluation Leases,* 44 Ill. B.J. 312 (1956); Landis, *The Drafting of Percentage Leases,* 11 U. Toronto L.J. 43 (1955); Van Doren, *Some Suggestions for the Drafting of Long Term and Percentage Leases,* 51 Colum. L. Rev. 186 (1950); Note, *The Percentage Lease—Its Functions and Drafting Problems,* 61 Harv. L. Rev. 317 (1947); Note, *Resolving Disputes Under Percentage Leases,* 51 Minn. L. Rev. 1139 (1967); Note, *The Lessee's Obligations Under a Percentage Lease,* 60 N.W.U.L. Rev. 677 (1965); 35 Mich. L. Rev. 95 (1936).

[2] Denz, *Lease Provisions Designed to Meet Changing Economic Conditions,* 1952 U. Ill. L.F. 344, 351.

If a lease contains percentage provisions, chances are it falls within one of four categories:

1. A lease requiring a specific percentage of gross sales as rental with a guaranteed minimum.
2. A lease requiring a specific percentage of gross sales as rental with no guaranteed minimum.
3. A lease, as in Number 2, but with a minimum established after a fixed period of time and based on a percentage of the average rental developed during the "no minimum period."
4. A lease designating the rental as a percentage of profits.[6]

Agreements requiring a fixed minimum rental appear to be the prototype, with a great deal of litigation centering around the extent to which the tenant is obliged to provide the landlord with a return in excess of the agreed-upon minimum.[7] Correspondingly, the least preferred form is one wherein the landlord collects as rent solely a portion of the tenant's profits.[8] From the lessor's standpoint, the latter arrangement is not advantageous, for in most situations the tenant is operating a volume business with a relatively low margin of profit.[9]

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[3] *Id.*

[4] S. McMichael, Leases: Percentage, Short and Long Term 21 (4th ed. 1947).

[5] *See, e.g.,* Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, 1042 (1928) (lessor's compensation under oil and gas lease varies with production).

[6] S. McMichael & P. O'Keefe, *supra* note 1, at 34.

[7] For a discussion of litigation concerning the limitations on the lessee's duty, see notes 93 through 114 and accompanying text *infra.* When a dispute over a percentage lease arises, if the lease in question contains a substantial minimum guaranteed rental, the court may find that the tenant owes no more than the agreed-upon minimum. In such a case, the tenant may then engage in conduct that reduces the percentage rent owed over the guaranteed minimum. The typical tenant maneuver is to completely cease operations. On the other hand, where the court finds that the guaranteed rent is not substantial, the tenant may not be allowed to take any action that would reduce the percentage rent. Note, *The Lessee's Obligation Under a Percentage Lease,* 60 N.W.U.L. Rev. 677, 680 (1965).

The "pure" percentage lease, one which provides for no fixed rent, is by no means the norm, but it illustrates the legitimate functions fulfilled by percentage rental plans. The landlord contracts to receive as his only compensation a stipulated percentage of the tenant's gross sales. Relinquishing any claim to a fixed return, he anticipates rental payments commensurate with the potential productivity of his property. Accordingly, he expects this self-modifying rental arrangement to provide a hedge against fluctuating dollar values and rising maintenance costs.[10]

The lessee's objectives are different, but not fundamentally so. Essentially, he is purchasing for a term of years the services that the demised property is capable of rendering. As a retail merchant, he recognizes that location will contribute substantially to the success or failure of his enterprise.[11] Accordingly, if the premises prove productive, he will pay a premium reflecting the percentage of business contributed by the location. Likewise, his rent will be reduced in the event the property is not conducive to the type of business undertaken.[12]

The percentage lease also serves useful functions from the standpoint of public policy. Low starting rentals, for instance, may attract capital to deteriorated locations sorely in need of economic rehabilitation.[13] Moreover, retailers with little or no business experience may have an opportunity to invest under conditions of limited risk.[14] Assuming that retail merchants are less inclined to purchase or construct their own facilities if they can procure a percentage lease, the risk sharing feature encourages lessor investment in rental property and thereby promotes a broader distribution of business returns.

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[8] *See* S. McMichael, *supra* note 4, at 29 (percentage lease not recommended because of difficulties in determining profit).

[9] *See* S. McMichael & P. O'Keefe, *supra* note 1, at 43 (modern supermarkets and department stores operate on narrow profit margin).

[10] Note, *The Percentage Lease—Its Functions and Drafting Problems*, 61 Harv. L. Rev. 317, 318 (1947).

[11] S. McMichael & P. O'Keefe, *supra* note 1, at 33. For example, a location on one side of a street may do up to 50% more business than a location across the street. *Id.*

[12] Note, *Resolving Disputes Under Percentage Leases*, 51 Minn. L. Rev. 1139, 1139 (1967); Note, *supra* note 7, at 678.

[13] Note, *supra* note 10, at 320.

Despite the relative advantages to both parties and to the public, percentage leases have been the subject of considerable litigation. In a large number of disputes, courts merely are asked to interpret lease provisions and reach a decision with regard to such matters as what constitutes sales,[15] how the percentage rental base is to be determined,[16] the methods for computing[17] and safeguarding the payment of rent,[18] and the lessee's right to sublet or assign the premises.[19] Under other circumstances, however, interpretative problems are not so easily resolved by reference to the lease agreement. Where, for example, the contemplated enterprise proves successful, the tenant may attempt somehow to reduce or eliminate the percentage of profits or gross receipts he must share with his landlord.[20] While such machinations will unquestionably injure the landlord and perhaps be unfair, they often are not expressly prohibited by the agreement itself. Thus, in order to evaluate properly these modes of conduct and to reach a creative accommodation with respect to the parties' legitimate interests and expectations, courts must look to more general principles—principles which personify good faith and fair dealing.

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[14] *Id.* The inexperienced retailer, by using a percentage lease with a minimum rental, limits his monetary risk to that minimum. In addition, an inexperienced retailer may limit his risk further by using a percentage lease as a lever to obtain a good location, thereby increasing his chance of success. *See* note 11 and accompanying text *supra.*

[15] *E.g.*, Fairlawn Plaza Dev., Inc. v. Fleming Co., 210 Kan. 459, 502 P.2d 663, 670-71 (1972) (sales include only sales to customers and not to lessee's other stores); *see* Landis, *supra* note 1, at 45-50 (defining sales in percentage leases).

[16] *E.g.*, Mileage Realty Co. v. Miami Parking Garage, Inc., 146 So. 2d 403, 406 (Fla. App. 1962) (taxes deductible in computing rental base). The problem of what items are to be included in the percentage rental base is, in one sense, a definitional question. Often, the lease expressly provides the effects that taxes, credits, employee and customer discounts, refunds, and interest charges have on the rental base. The courts are often required to solve the problems of incomplete and unclear lease provisions. These decisions often involve determinations of whether such things as discount sales to employees, credits or payments to settle loss claims, sales to diminish inventory, and incidental receipts from on-the-premises concessions are to be taken into account in the computation of gross receipts. There are performance overtones, however, particularly with respect to the inclusion of items which may have been transferred to other branch stores. *See* Landis, *supra* note 1, at 45-53 (discussion of what constitutes rental base).

[17] *E.g.*, Gluce v. Commercial Merchants Nat'l Bank & Trust Co., 85 F. Supp. 287, 290 (D. Ill.) (rent computed as 5% of gross sales), *aff'd*, 181 F.2d 773 (7th Cir. 1949); *see* Note, *supra* note 10, at 324 (calculation of percentage rent). The usual practice is to calculate percentage rent, and any guaranteed minimum, on the basis of an annual period. Permitting the tenant to set off good months against bad months is particularly helpful where business volume varies considerably from month to month. The landlord would prefer a payment which reflects current operations, so that he would not have to rely on the tenant's end-of-the-year financial position. This potential conflict provides a basis for litigation, particularly where adequate provision is not made in the lease agreement. *Id.*

[18] *E.g.*, Garden Suburbs Golf & Country Club, Inc. v. Pruitt, 156 Fla. 825, 24 So. 2d 898, 900 (1946) (landlord had right to independent audit); *see* Landis, *supra* note 1, at 57-62 (accounting requirements in percentage leases). The parties' failure to stipulate accounting procedures which accurately reflect sales and to make other appropriate ad-

Courts do not always require good faith performance, however, even where the lease is completely silent as to the standard for business conduct. Perhaps, as one student commentator has suggested, this is a result of the "apparent vagueness of a good faith covenant with its attendant difficulty of enforcement."[21] Yet, the law always has acknowledged that an individual who contracts to confer a benefit on another is under a duty to do nothing which substantially detracts from the other's enjoyment of that benefit.[22] Moreover, in contracts where, as in percentage leases, one party's contractual benefits depend solely on factors within the other party's control, courts frequently have held that

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justments of the rental base also gives rise to this type of litigation. Since accurate computation of percentage rent hinges on proper bookkeeping, courts in some circumstances may be justified in requiring inspection privileges for the lessor or even in directing an independent audit. *Id.*

[19] *See, e.g.,* McFadden-Deauville Hotel v. Murrell, 182 F.2d 537, 539-40 (5th Cir. 1950) (percentage lease assignable); Garden Suburbs Golf & Country Club, Inc. v. Pruitt, 156 Fla. 825, 24 So. 2d 898, 900 (1946) (percentage lease authorizing sublease of portion of premises did not contemplate subletting entire premises).

[20] *See* Landis, *supra* note 1, at 65. The landlord and the tenant do not necessarily have the same interest in maintaining the highest possible volume of sales. For example, the tenant may realize additional profit by cutting such costs as advertising and personnel. These cuts may in turn reduce the volume of sales and the landlord's return. *Id.*

[21] Note, *supra* note 7, at 684. In interpreting a good faith covenant, a court must determine what actions by the lessee constituted bad faith and the amount of damages resulting to the lessor. A problem arises in determining which of the lessee's actions in reducing business were in bad faith, which were for legitimate business reasons, and how each should be allocated to the percentage rental base. *Id.*

[22] *See* notes 26 through 41 and accompanying text *infra.*

the latter must exert reasonable efforts to ensure that those benefits are received.[23] When one considers that the percentage lessor is not only a landlord but also a risk-sharing participant in the lessee's business, it makes eminent good sense to require of both parties the same lofty standards attributed to partners in a continuing enterprise.[24]

This article is an attempt to examine these various bases for requiring good faith performance and to apply them to the conduct of business operations under percentage rental agreements. Good faith goes beyond a mere state of mind on the part of the percentage lessee and requires an inquiry into what types of business conduct comport with community standards of fairness, decency, and reasonableness in performance and enforcement.[25] The standard, then, is primarily an objective one which takes into account not only the possible reduction of the landlord's percentage return but also any reasonable business justifications for the reduction. "Good faith" language is not determinative. Quite often, courts speak in terms of implied covenants or duties, referring all the while to the parties' legitimate expectations with respect to fairness in carrying out their contractual obligations. For this reason, the cardinal notion of an "implied term" never to interfere with another's contractual benefits provides an appropriate starting point for this survey.

II. BASES FOR REQUIRING GOOD FAITH PERFORMANCE

A. *The Implied Term*

Professor Raphael Powell traces the concept of good faith performance to the Romans and their conversion of "bona fides" into a basis of legal action.[26] "The praetor, a Roman magistrate, addressed a formula to the judge, instructing him to condemn the defendant to perform for the plaintiff whatever he ought to perform *ex fide bona*—in accordance with good faith."[27] From this practice, a structure of legal rules developed which defined obligations in most normal commercial transactions. Significantly, Roman lawyers were less concerned with ethical principles in their treatment of good faith than they were that parties to a contract observe the "usual customary rules" applying to the transaction.[28]

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[23] *See* notes 42 through 52 and accompanying text *infra*.

[24] *See* notes 53 through 68 and accompanying text *infra*.

[25] *See* Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666, 672 (1963). The standard for determining good faith performance is objective and is based on decency, fairness, and reasonableness in the business community and not on the individual's belief that he was acting in good faith. *Id.*

[26] Powell, *Good Faith in Contracts*, 9 CURRENT LEGAL PROB. 16, 20 (1956).

Although canon lawyers were preoccupied with the moral foundations for rules during the Middle Ages,[29] English courts acknowledged an objective criteria for good faith performance during the nineteenth century.[30] While this standard was predicated primarily on considerations of decency and common honesty, it also reflected a feeling that business could not be carried on smoothly if a merchant could not depend on getting the full value from his contract.[31] Consequently, there developed the concept of "implied terms" in contracts, whereunder the parties were considered to have covenanted to do nothing which might render the other party's enjoyment of the contractual benefit less lucrative.[32]

While the English courts appear to be moving away from the Roman concept of "good faith" in contractual dealings, in this country the courts of several states assert that every agreement includes an implied undertaking not to interfere with another's contractual benefits.[33] A classic illustration is offered by

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[27] *Id.*

[28] *Id.*

[29] *Id.* at 22.

[30] *See* Gill v. Cubitt, 107 Eng. Rep. 806, 806 (K.B. 1824) (discounter acts in bad faith when he accepts a bill under circumstances which would arouse suspicions in a careful and prudent man); *cf.* Goodman v. Harvey, 111 Eng. Rep. 1011, 1013 (K.B. 1836) (holder of a bill may be barred from recovery by bad faith only if his acceptance of the bill was grossly negligent); Lawson v. Weston, 170 Eng. Rep. 640, 640 (K.B. 1801) (one who discounts a bill upon a fraudulent indorsement may recover if value was given without notice of fraud). For a discussion of the above-cited cases, see Farnsworth, *supra* note 25, at 670.

[31] Burrows, *Contractual Co-operation and the Implied Term,* 31 MOD. L. REV. 390, 390 (1968).

[32] *Id.*

[33] *See, e.g.,* Bleecher v. Conte, 29 Cal. 3d 345, 626 P.2d 1051, 1053, 173 Cal. Rptr. 278, 280 (1981) (all contracts contain implied covenant of good faith performance); Rowe

Patterson v. Meyerhofer,[34] where the defendant contracted to purchase land from the plaintiff with full knowledge that the plaintiff intended to buy the property at a foreclosure sale. When the defendant prevented the plaintiff from obtaining the property by outbidding him at the sale, the plaintiff brought suit for the profits he otherwise would have enjoyed under the contract. Finding for the plaintiff, the court declared that there was an "implied undertaking" that the defendant would not "prevent the other party from carrying out the agreement on his part."[35]

A similar adjustment was made by the same court in the celebrated case of *Kirke La Shelle Co. v. Paul Armstrong & Co.*[36] There, the plaintiff entered into an agreement whereby he was to receive one-half of the proceeds from the stage production of the play, "Alias Jimmy Valentine." Without consulting the plaintiff, the defendant transferred the talking picture rights to Metro-Goldwyn-Mayer. Recognizing an implied obligation on the defendant's part not to render the plaintiff's contractual rights valueless, the court held that the plaintiff was entitled to one-half of the net proceeds from the sale of the movie rights.[37]

Though the concept of an implied obligation to avoid interference with performance is not applied consistently by courts in all United States jurisdictions,[38] it seems particularly apposite with respect to percentage rental agreements, where the lessor's return is dictated by factors within the tenant's control. This was the view taken by the New York Supreme Court in *Goldberg, 168-05 Corp. v. Levy,*[39] involving a landlord's claim to damages based on the percentage lessee's diversion of sales to another location. The court found an "implied . . . covenant

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v. Great Atl. & Pac. Tea Co., 46 N.Y.2d 132, 385 N.E.2d 566, 569, 412 N.Y.S.2d 827, 830 (1978) (same). *But cf.* McPherson v. Gullett Gin Co., 134 Miss. 771, 781-82, 100 So. 16, 18 (1924) (parties owe no implied duties; rights and liabilities measured by contract). *See generally* Farnsworth, *supra* note 25, at 671 (several states hold that percentage lease contains implied covenant of good faith).

[34] 204 N.Y. 96, 97 N.E. 472 (1912).

[35] 97 N.E. at 473.

[36] 263 N.Y. 79, 188 N.E. 163 (1933).

[37] 188 N.E. at 168.

[38] *See* note 33 *supra.*

[39] 256 A.D. 1086, 11 N.Y.S.2d 315 (1939).

that the tenant would not do anything that would bring about, or that would contribute to bring about, a reduction of the gross value of sales made in the demised premises . . . ."[40]

Thus, following the lead of the Romans, and to some extent of the British, it would seem desirable for courts to attribute to the percentage lessee an implied duty not to interfere with the landlord's contemplated percentage return. Such an obligation would be consistent with the fundamental precept that contracting parties have implicitly agreed to do nothing to reduce the other's bargained-for benefits, and it would protect reasonable expectations with regard to performance and enforcement. Moreover, since the percentage lease is a commercial arrangement, the duty, as in Roman law, should be measured by an objective standard, one "based on decency, fairness and reasonableness of the community, and not on the individual's own beliefs as to what might be decent, fair, or reasonable."[41]

B. Duty to Exert "Reasonable Efforts"

Occasionally, in contracts where the enjoyment of benefits by one party is entirely dependent on factors within the other party's control, courts must determine whether the latter party incurred a binding obligation to exert "reasonable efforts." A classic illustration is furnished by *Wood v. Lucy, Lady Duff Gordon.*[42] Lucy, a noted creator of fashions, granted Wood the exclusive right to market her designs. Wood, who was to pay Lucy one-half of the profits from sales he might make, also was given exclusive authorization, subject to Lucy's approval, to place Lucy's endorsement on the designs of others. When Lucy, without Wood's knowledge, placed her endorsement on certain fabrics, dresses, and millinery, Wood sued for damages resulting from the violation of his exclusive agency agreement. Lucy contended there was no contract because Wood came under no obligation to use her endorsement or market her designs. The court, however, found that acceptance of the exclusive agency impressed upon Wood the duty to exert reasonable efforts in marketing the designs and placing endorsements. The court reasoned that since Lucy's sole compensation was to be a percentage of Wood's profits and revenues, there was an implied "promise to use reasonable efforts to bring those profits and revenues into existence."[43] Without such an implied promise, the court concluded, the agreement would have no "business 'efficacy' "[44] and would be binding on neither party.[45]

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[40] 11 N.Y.S.2d at 316. The lower court was even more emphatic, asserting that "[s]uch conduct would be in direct violation of the covenant of good faith and fair dealing which exists in every contract." Goldberg, 168-05 Corp. v. Levy, 170 Misc. 292, 9 N.Y.S.2d 304, 306 (Sup. Ct. 1938), *aff'd,* 256 A.D. 1086, 11 N.Y.S.2d 315 (1939).

[41] Farnsworth, *supra* note 25, at 672.

[42] 222 N.Y. 88, 118 N.E. 214 (1917).

The court's opinion in *Lucy, Lady Duff Gordon* was directed primarily to whether the conferral of rights pursuant to an exclusive agency agreement was supported by sufficient consideration. It brilliantly illustrates, however, the need for providing judicial protection for the legitimate expectations of parties with respect to the carrying out of apparently one-sided bargains. Essentially, this is the problem encountered under output and requirement contracts where, as Williston notes, there arises "a promise implied in fact by the seller to continue in *good faith* production or sales, or on the part of the buyer to maintain his business or plant as a going concern and to take its bona fide requirements."[46]

The same issue arises in other types of contracts in which one party's compensation is contingent upon the other's sales, profits, or receipts.[47] When confronted with such provisions, courts frequently have used good faith as a basis for implying a condition of cooperation by the party who is to render payment. Professor Corbin has aptly characterized the obligation as an implied promise to "use diligence and [to] neither wilfully nor negligently do anything that will prevent or reduce the sums to be paid."[48]

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[43] 118 N.E. at 215.

[44] *Id.*

[45] *Id.* at 214-15.

[46] 1 S. WILLISTON, CONTRACTS § 104A, at 357 (rev. ed. 1936) (emphasis added & footnotes omitted). The obligation arises "from the business situation, from the conduct of the parties, and from the startlingly disproportionate burden otherwise cast upon one of them . . . ." *Id.*

[47] *See, e.g.,* Universal Sales Corp. v. California Press Mfg. Co., 20 Cal. 2d 751, 128 P.2d 665, 669 (1942) (plaintiff's return based upon defendant's sales); Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W.2d 1039, 1040-41 (1928) (royalty payment dependent upon production).

The percentage lease offers a splendid opportunity for the unscrupulous tenant to sidestep any obligation to use diligence in conducting the agreed-upon business. Where, for example, the lease agreement contains no provision guaranteeing a stated minimum rent, the lessee conceivably can exploit the percentage provision to sound out the potential value of a location, and, after the venture proves successful, employ one or more devices to vitiate the lessor's rental return.[49] Unless there is an implied understanding that he perform in good faith and exert reasonable efforts in making sales and developing the contemplated business, the lessor's legitimate expectations as to the conduct of business operations may be defeated.

An excellent illustration of constructive intervention to protect the lessor's expectations regarding business operations is offered by *Marvin Drug Co. v. Couch.*[50] There, a chain drug company leased premises on which the plaintiff-landlord had previously operated a drug store, agreeing to pay six percent of its gross receipts as rent. After three years, the lessee reduced from seventeen to eleven the daily business hours which had been previously maintained both by the landlord and itself. In an action by the landlord for six percent of the additional gross receipts which would have been collected had the store been operated seventeen hours daily, the court found an implied obligation to operate in conformity with custom, without regard for profit. The court reasoned that it was "within the contemplation of the parties that the store should be operated as was usual and customary of similar stores in the vicinity."[51] The court concluded that since the lease was silent on the subject, the defendant's obligation would be implied.[52]

The court's apt reasoning suggests that the percentage lease, like other apparently one-sided bargains, contemplates active cooperation by the advantaged party. It makes eminent good sense, therefore, to predicate good faith on a positive duty to exert reasonable efforts as well as on a negative duty to refrain from interfering with performance.

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[48] 3 A. Corbin, Contracts § 570, at 345 (1960).

[49] *See* Note, *supra* note 7, at 687 (lessee may profit unfairly); note 20 and accompanying text *supra.*

[50] 134 S.W.2d 356 (Tex. Civ. App. 1939).

[51] *Id.* at 361.

[52] *Id.* For analyses of *Marvin Drug,* see 25 Cornell L.Q. 615, 615-18 (1940); 53 Harv. L. Rev. 1203, 1203-04 (1940).

C. *Quasi-Partnership*

As has been noted previously, shared participation in the fruits of the demised premises is a central theme of percentage rental agreements. The landlord, by virtue of his agreement to accept a reduced return on his investment in times of business decline, is promised a percentage of profits or gross returns throughout the term of the lease. Thus, in a substantial sense, the lessor and the lessee can be viewed as being in business together. They are partners, or at least quasi-partners, in a voluntary business association based on contract.[53]

Of course, very few percentage rental contracts would satisfy the formal requirements for partnership, even where the landlord's return is predicated on net profits.[54] The Uniform Partnership Act expressly excludes such agreements from those transactions in which a presumption of partnership arises,[55] and most authorities infer that neither a partnership nor a joint venture arises from the mere execution of a percentage lease.[56] The usual reason given for the distinction is that the percentage lease, unlike the partnership agreement, involves no commitment on the part of the landlord to absorb operating losses[57] or to discharge debts.[58]

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[53] *See* J. CRANE & A. BROMBERG, LAW OF PARTNERSHIP 38 (1968) (partnership defined as voluntary association based on contract).

[54] According to the Uniform Partnership Act, a partnership is an association of two or more persons to carry on as co-owners of a business for profit. UNIFORM PARTNERSHIP ACT § 6(1). *See generally id.* §§ 6-7 (technical requirements for partnership).

Interestingly, the Uniform Partnership Act provides that profit sharing is prima facie evidence of partnership. Yet, by the same token, the payment of rent to a landlord is not considered as raising such a presumption. Nonetheless, an actual sharing of net profits plus other incidents of lessor involvement in the contemplated enterprise may raise suspicion as to whether the relationship is in fact a partnership. *Id.* § 7(4); *see* J. CRANE & A. BROMBERG, *supra* note 53, at 88-91 (profit sharing in payment of rent does not establish partnership).

[55] UNIFORM PARTNERSHIP ACT § 7(4)(b).

[56] 1 AMERICAN LAW OF PROPERTY § 3.66, at 341 (A.J. Casner ed. 1952) (lessor not loss-sharing partner); J. CRANE & A. BROMBERG, *supra* note 53, at 88 (intent prerequisite to finding lessor partner in percentage lease).

Yet percentage leases almost invariably involve situations where, as in partnership compacts, "one person has another's property, authority, or confidence."[59] The typical tenant not only occupies the landlord's premises, but also controls the myriad factors bearing on the return which those premises will yield. Also, respecting the view that percentage lessors are not obliged to sustain the burdens of the agreed-upon business, it should be noted that percentage rent is subject to diminution, perhaps even extinction, if sales or profits decline. Hence, while the instrument may not fulfill the technical prerequisites for partnership or meet the usual conditions with respect to joint liability, it definitely contemplates a sharing of business risks by the landlord and tenant during the lease term. On this basis, an argument can be made for holding the parties to the same high fiduciary standards required of partners, including the obligation to carry out business operations with the "utmost good faith, fairness [and] loyalty."[60]

Nevertheless, few courts are prepared to acknowledge a quasi-partnership, even where it seems necessary in order to protect the parties' legitimate expectations regarding fairness in performance.[61] Judicial intervention is typically premised on an implied covenant to refrain from interfering with performance or on a duty to exercise reasonable diligence in ensuring that bargained-for benefits are received.[62] A slightly broader standard was adopted in *Stockton Dry Goods Co. v. Girsh,*[63] a decision which was subsequently overturned.[64] The case involved a five-year lease of department store space for conducting a retail shoe business. No minimum rent was stipulated, though by the terms of the lease, the landlord was to receive ten percent of all cash sales and eleven percent on net charge sales. The landlord sought declaratory relief permitting him to conduct other shoe departments in the store. The lower court declared that competition of this sort would destroy the relationship intended by the parties. That relationship, the court reasoned, was "reciprocal" and imposed on the lessee a duty to "conduct such business as to maintain as large a trade as could be done with reasonably active and competent management."[65] Accordingly, the lessor was obliged "to place no obstacle in the way of the lessee in the performance of that covenant."[66] The court's felicitous reasoning seems to suggest that in evaluating performance under percentage leases, courts should accentuate the parties' mutual (*i.e.*, "reciprocal") interests at the expense of traditional notions of "free enterprise and look out for yourself."[67] Although this case has been overruled,[68] the lower court's cognizance of the parties' mutual interests, obligations, and needs for good faith standards may furnish a realistic approach to protecting the parties' rights in complex percentage contracts.

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[57] *See, e.g.,* Nelson v. Seaboard Sur. Co., 269 F.2d 882, 888 (8th Cir. 1959) (partnership involves sharing profits and losses); *In re* Owl Drug Co., 12 F. Supp. 439, 444-45 (D. Nev. 1935) (lessor shielded from liability for lessee's acts); State Elevator Co. v. Farmer's Elevator Co., 95 Mont. 557, 27 P.2d 743, 745 (1933) (no express covenant for lessor to pay losses).

[58] *Cf.* Florence v. Fox, 193 Iowa 1174, 188 N.W. 966, 966-67 (1922) (lessor not liable for injury to workman hired by percentage lessee).

[59] J. CRANE & A. BROMBERG, *supra* note 53, at 389.

[60] *Id.* at 390.

[61] *See* notes 33 through 40 and accompanying text *supra.*

[62] *See* notes 42 through 48 and accompanying text *supra.*

[63] 221 P.2d 186 (Dist. Ct. App. 1950), *rev'd,* 36 Cal. 2d 677, 227 P.2d 1 (1951).

The analogy to partnership is obviously deficient in many particulars, but it underscores the second, and perhaps the more important, dimension of percentage rental agreements, that involving the exploitation of a common asset—the lessor's property. To the extent that the landlord and tenant do have a common purpose, it seems eminently reasonable to apply standards which consider their mutual as well as their selfish interests. It is on this premise that this study proceeds, realizing all along that applicable case law is not supportive of the quasi-partnership view or, for that matter, of a general contractual obligation of good faith and fairness in performance. Nevertheless, past decisions provide an appropriate framework for examining the various types of business conduct which give rise to claims that the percentage lessee has acted in bad faith.

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[64] Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1 (1951).

[65] 221 P.2d at 187.

[66] *Id.* at 188.

[67] Burrows, *supra* note 31, at 405.

[68] Stockton Dry Goods Co. v. Girsh, 36 Cal. 2d 677, 227 P.2d 1 (1951). The California Supreme Court completely rejected the holding of the appellate court, finding in effect that there was no implied covenant on the part of the lessor not to compete with the lessee. 227 P.2d at 4.

III. Good Faith and Conduct of the Business

When dealing with the problem of determining the types of business conduct which import bad faith on the part of the percentage lessee, it should be borne in mind that the lessee, like other retail operators, is influenced by the desire to gratify economic self-interest. Accordingly, it is not surprising that he might pursue modes of conduct not altogether compatible with the assurance of a full return for his contractual partner—the percentage lessor. Where such behavior is indicative of a desire merely to decrease percentage rent, rather than a reasonable business judgment affecting the profitability of the demised premises, courts should intervene to protect legitimate expectations of fairness in performance. As the following discussion will indicate, there is a fine line between those activities which may be considered fair and reasonable and those which are presumptive of bad faith.

A. Curtailment of Business

Curtailing business operations is a tactic frequently employed by merchants to limit their obligations under percentage rental agreements. Curtailment is manifested most often by a decision to discontinue certain aspects of the enterprise or to limit the number of hours or days that the establishment is open to the public, and it invariably involves a departure from the conditions contemplated under the lease. To determine whether the curtailment decision was dictated by reasonable business judgment or was instead part of a scheme to vitiate percentage rent, it is necessary to consider not only the lessee's economic interests, but also whether the landlord was denied the benefit of sales which otherwise would have been made and upon which the percentage return may have been based.[69]

An excellent illustration of judicial creativity in dealing with curtailment by reduction of business hours is offered by *Marvin Drug Co. v. Couch.*[70] There, the court rejected the argument that business losses justified a drug company's reduction of its daily operating hours from seventeen to eleven.[71] Imposing upon the lessee an obligation to conduct the business as would a person of ordinary prudence, the court seemed to suggest that even a losing venture must be carried out in the manner initially contemplated—at least until the expiration of the lease term. The holding's extreme position in this respect is compensated admirably by the court's recognition that performance under percentage leases must take into account the economic interests of the lessor as well as the lessee.[72]

This criterion is equally appropriate where the percentage tenant elects to suspend business operations during certain months of the year. An illustration is furnished by *Mayfair Operating Corp. v. Bessemer Properties, Inc.,*[73] involving the lease of a Miami, Florida theater building for $300 per month plus ten percent of the annual gross revenues in excess of $3,600. Unlike many percentage agreements, the lease contained a covenant requiring the lessee to use his "best efforts" to maintain the highest volume of business obtainable on the premises.[74] During his third year of occupancy, the tenant announced his intention to suspend business operations during the summer months. The building's owner, whose return during those months would have been reduced to the stipulated minimum, sought a declaration requiring that the theater be operated year-round.[75] After considering the lessee's contention that the theater business in Miami was seasonal and that this fact justified a suspension of summer productions, the court held that the right to curtail operations was not available to the percentage lessee.[76] Taking notice of the covenant to use best efforts, the court employed *Lucy, Lady Duff Gordon*-type reasoning to find that the elimination of percentage rent would defeat the parties' reasonable expectations as to the conduct of the contemplated business.[77]

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[69] *See* Landis, *supra* note 1, at 69-70 (effect of curtailment on parties to percentage lease).

[70] 134 S.W.2d 356 (Tex. Civ. App. 1939). For further discussion of this case, see notes 50 through 52 and accompanying text *supra.*

[71] 134 S.W.2d at 361.

[72] The court noted that the lessee was required to perform as a "person of ordinary prudence, having regard to the interest of the lessor . . . ." *Id.*

[73] 150 Fla. 132, 7 So. 2d 342 (1942).

[74] 7 So. 2d at 342.

[75] *Id.*

Judicial intervention to assure the lessor a fair return on his investment must be balanced against the view that requiring the tenant to keep up with competitors in order to provide percentage rent is an unjust imposition on his freedom. An illustration of this principle is *Dickey v. Philadelphia Minit Man Corp.*[78] In *Dickey,* the tenant conducted a car wash under a percentage lease which provided that the tenant would use the demised premises solely for washing automobiles. He was to pay the sizeable minimum annual rent of $1,800 plus twelve percent of gross sales.[79] After approximately five years, during which time business volume remained at a high level, the lessee discontinued cleaning autos except as an incident to polishing them.[80] Although he continued to pay at least the minimum rent, percentage returns declined considerably. The landlord instituted an action of ejectment on the ground that the lessee had defaulted by discontinuing the contemplated business.[81] The court refused to imply a duty under the lease to continue cleaning autos, declaring that it was "quite unreasonable and wholly undesirable to imply an obligation that would necessarily be vague, uncertain, and generally impracticable."[82] While the rather substantial minimum rent unquestionably influenced the court, the holding seems to rest instead on the lack of any showing that the tenant was motivated by a desire to decrease percentage rent and thereby injure the landlord.[83]

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[76] *Id.* at 343.

[77] *Id.*

[78] 377 Pa. 549, 105 A.2d 580 (1954).

[79] 105 A.2d at 580.

[80] *Id.* at 581.

[81] *Id.*

[82] *Id.* at 582; *cf.* Hicks v. Whelan Drug Co., 113 Cal. App. 2d 110, 280 P.2d 104, 108 (Dist. Ct. App. 1955) (no implied duty to continue use of soda fountain in leased drug store); Fay v. Montgomery Ward & Co., 19 Ill. App. 302, 153 N.E.2d 421, 421 (1958) (no implied duty not to use 25% of leased space for non-income-producing warehousing); Weil v. Ann Lewis Shops, Inc., 281 S.W.2d 651, 656 (Tex. Civ. App. 1955) (failure to occupy premises created no duty to pay percentage rent).

While the *Dickey* view is laudatory for recommending an objective standard for evaluating performance under percentage rental agreements, it is useful only to the extent that it takes into account the legitimate interests of both the lessor and lessee. The lessor does not expect, and is not entitled to, the lessee's continuance in a demonstrably unproductive type of activity. Yet he does anticipate a return commensurate with the potential productivity of his property. In this sense, it is arguable that the lessee should not be permitted to curtail an otherwise productive endeavor, no matter how patently reasonable that curtailment may be from the standpoint of his personal business interests.

B. *Cessation of Operations*

A lessee's complete curtailment of operations poses an even more difficult problem. At the beginning of the lease term, the contractual partners contemplate a productive venture. The percentage lessee, having secured what he believes is a promising location, hopes to develop a volume of business that he might not achieve in another spot. The lessor, realizing that the location will be a factor in developing business potential, expects to profit from the lessee's astute and aggressive exploitation of his property. Both recognize that the premises may prove unproductive and that a trend in this direction may be established fairly early in the lease term. If one assumes that business failure is not outside the contemplation of the parties, then the focus of the inquiry becomes one of determining under what circumstances, if any, the tenant would be allowed to discontinue business for the remainder of the term.

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[83] 105 A.2d at 583. The court noted that the defendant had not deliberately sought to decrease the percentage rent payable to Dickey, but, on the contrary, had sought to maintain the lease. *Id.* The court concluded that the defendant's action "was taken . . . in good faith and in the exercise of legitimate business judgment." *Id.*

1. The "Pure" Percentage Lease: No-Minimum or Low-Minimum

In the classic, though less common, variety of percentage lease, where there is no minimum rent, or the minimum is nominal, both parties' legitimate interests may well be served by permitting discontinuance of an unproductive business. This would allow the lessee to minimize business losses and perhaps to salvage a portion of his assets for reinvestment in another, more advantageous location. It also would permit the lessor to find a new business tenant and thereby assure that his property remains an active, income-producing asset.[84]

When it is the operator, and not the operation, that has foundered, a different approach may be in order. Even in volume businesses, where location rather than merchandising skill is assumed to be the dominant factor in influencing returns, the percentage lessee is not without an obligation to develop the potential of the business. This is especially true where the lessee acts to defeat his landlord's anticipated returns under the percentage provision.[85] Thus, where the responsibility for business failure can be attributed primarily to the tenant, cessation of operations will not necessarily protect the parties' legitimate expectations. Indeed, it may defeat them.

Much of the litigation surrounding this problem has arisen in situations where the tenant discontinued operations yet refused to relinquish possession of the landlord's property. Excellent illustrations are found in the *Sinclair Refining Co. Cases,*[86] involving gas station leases under which the lessors were promised nominal rent plus a percentage return from each gallon of gasoline sold. The tenants ceased operations, and the landlord was allowed to recover possession, based on an implied covenant to continue operations throughout the term.[87] Considering that the tenants averred that operations had become unproductive due to the installation of competing stations in the general locality,[88] perhaps a different approach would have been taken had possession been surrendered. Perhaps, rather than implying a duty to continue operations, the courts might have held that cessation of operations vindicated the parties' expectations, giving them an opportunity to withdraw from and cover for an unproductive investment.

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[84] *See generally* Note, *supra* note 7, at 677-78 (advantages of percentage leases).

[85] *See generally id.*

[86] Sinclair Refining Co. v. Giddens, 54 Ga. App. 69, 187 S.E. 201 (1936); Sinclair Refining Co. v. Davis, 47 Ga. App. 601, 171 S.E. 150 (1933).

[87] 187 S.E. at 202; 171 S.E. at 150.

If the lessee is responsible for the business' lackluster performance, a covenant to continue operations may be justified. The distinction is illustrated in *Prins v. Van Der Vlugt*,[89] in which the tenant contracted to use the leased premises for "physiotherapy" and to pay a stated percentage of gross receipts as rent. The tenant conducted physiotherapy on the premises for one and a half years, then moved her practice to another locality.[90] In a suit by the vacating lessee, requesting that she be relieved of any obligation under the percentage agreement, the court found "an implied covenant to continue the business"[91] in the demised premises. While acknowledging that the enterprise had been unprofitable, the court was not convinced that the tenant had done her part in developing the location's potential. Evidence was introduced, for example, showing that plaintiff's practice had been quite successful at first, but had declined when personal matters diverted her attention from business.[92] Since the landlord's rent was vitiated for reasons apparently unconnected with the potential productivity of the demised premises, the court's intervention in the interest of assuring fair performance seems justified.

2. Limitations on the Lessee's Duty: Cessation and the "Substantial Minimum"

a. The Bonus Principle

A determination of the lessee's duty to continue business operations is particularly perplexing where the parties have stipulated a fixed minimum rental payment. According to one view, such a provision suggests a desire by the lessor and lessee to limit their obligations under the percentage agreement, perhaps to bring them more closely in line with duties imposed by flat-rate rental leases.[93] Hence, when the minimum is substantially equivalent to the fair rental value, percentage rent might be considered as little more than a bonus to the lessor, with the lessee obliged to pay only the stated minimum compensation. This principle underlies the decision in *Monte Corp. v. Stephens*,[94] which involved the cessation of business operations while under a lease providing for a $200 minimum monthly rent plus a percentage from gross receipts. Finding the excess over minimum rental to be a bonus, the court held that there was no contractual basis for implying a duty to "continue to occupy the premises and to conduct the business of selling merchandise therein."[95]

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[88] 187 S.E. at 203; 171 S.E. at 150.

[89] 215 Or. 682, 337 P.2d 787 (1959).

[90] 337 P.2d at 789.

[91] *Id.* at 796.

[92] *Id.* at 791.

It is questionable whether a provision stipulating a substantial minimum rent should absolve the lessee from all responsibility to continue operations in the landlord's premises. Arguably, if the lessee is allowed to cease operations at will for reasons bearing no necessary relation to the landlord's interests, the percentage provision serves no productive purpose in developing the location's potential. Based on this reasoning, the landlord might be better off with a flat-rental lease, under which he would have the benefit of increased fixed compensation for the entire lease term. Most courts, however, presume that where the landlord is receiving a substantially fair return in the form of guaranteed minimum rent, he is not entitled to an assured percentage payment. An illustration is offered by *Cousins Investment Co. v. Hastings Clothing Co.*,[96] which held that the duty to pay a substantial minimum rent was inserted in the lease as a "substitute" for a covenant requiring continuous operation of the demised premises.[97]

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[93] *See* Note, *supra* note 10, at 323.

[94] 324 P.2d 538 (Okla. 1958).

[95] *Id.* at 539.

[96] 45 Cal. App. 2d 141, 113 P.2d 878 (1941).

[97] 113 P.2d at 882. The rent at the time operations were discontinued was $4,000 per month plus 5 ½% of the gross income. This was to be paid in such a manner as to limit the total rent during a six-month period to an average of $5,500 per month. *Id.* at 879-80.

The most recent, and perhaps most far-reaching, application of this theory is found in *Stop and Shop, Inc. v. Ganem.*[98] A supermarket chain leased a lot and building for $22,000 a year plus a stated percentage of sales.[99] After several years of operations, the tenant let it be known that it intended to vacate the premises and to continue paying minimum rent.[100] The tenant sought declaratory relief to interpret its lease obligations. Despite evidence establishing that Stop and Shop had opened other stores at nearby locations,[101] selling the same merchandise at lower prices, the court held that payment of the substantial minimum rent justified the cessation of operations.[102] The court held that since the lessors did not show "that a reasonable person . . . would be justified in understanding that a[n implied] covenant [to remain in business] was intended,"[103] no such covenant would be implied.[104] The decision suggests that where the lessor is viewed as having bargained primarily for assurance of substantial fixed rent rather than for percentage participation in the business, courts will go very far indeed in absolving the lessee from any obligation to continue business operations.

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[98] 347 Mass. 689, 200 N.E.2d 248 (1964).

[99] 200 N.E.2d at 250.

[100] *Id.*

[101] *Id.*

[102] *Id.* at 252-53.

[103] *Id.*

[104] *Id.* In Great Atl. & Pac. Tea Co. v. Lackey, 397 So. 2d 1100 (Miss. 1981), A & P agreed to pay a monthly rental of $1,427 plus 1% of gross sales in excess of $1,712,400 for 15 years. *Id.* at 1101. During the term, A & P moved to a new building but continued to pay the minimum monthly rental. The lessor alleged that A & P had defaulted on the lease by failing to continue to operate a business in the demised premises. *Id.* at 1102. The Mississippi Supreme Court found that where a percentage lease provides for a fixed substantial minimum rent, no implied covenant for continuous use of the premises will be implied. *Id.* at 1103. Consequently, the court held that A & P had not breached the lease. *Id.* In Jenkins v. Rose's 5, 10 & 25 Cent Stores, 213 N.C. 606, 197 S.E. 174 (1938), defendant leased a storehouse, agreeing to pay a minimum yearly rent of $2,400 plus a percentage of gross sales. For the first three years the rent averaged $3,500 per year, but thereafter defendant moved its business to another location. In a suit by the landlord for additional percentage rent, the court held that the tenant was "under no obligation, in the absence of specific provision therefor, to occupy or use, or continue to use the leased premises, *even though one of the parties, or both, expected and intended* that they would be used for the particular purpose to which they seemed to be adapted or constructed." 197 S.E. at 175 (quoting Annot., 46 A.L.R. 1134 (1927)) (emphasis added). *But see* Fox v. Fox Valley Trotting Club, 8 Ill. 2d 571, 134 N.E.2d 806 (1956). There, the tenant leased a race track for $25,000 per year plus varying percentages of gross receipts from admission, fees, stakes wagered, and concessions. When operations were transferred to a more advantageously located tract, the landlord sued for an accounting. Holding that the minimum rent was insubstantial, the court ruled that it was not the intention of the parties that the lucrative racing operations and attendant pari-mutuel betting be

b. *Percentage Participation as Central to Performance*

A more creative approach, and one that more accurately reflects the purposes underpinning percentage leases, is to view the fixed minimum as merely a device to compensate the landlord for taxes, insurance, and other fixed charges incident to ownership of the demised property, as well as to cushion him against extreme business fluctuations. Under this view, the percentage feature is deemed to be central to the parties' bargain, with the lessee's duty to continue operations judged by essentially the same standards as are applied to "pure" percentage agreements.[105]

The principle is illustrated by *Simhawk Corp. v. Egler.*[106] In return for the tenant's promise to pay a $350 fixed monthly rent plus varying percentages of gross sales, the landlord agreed to convey the first floor of his building and basement space for the operation of a children's shoe store.[107] After several years of productive operations, the tenant ceased doing business on the premises and moved to a new building only two doors away.[108] The lessor sought declaratory judgment requiring continuation of the enterprise in his premises for the remainder of the lease term. Despite the tenant's expressed willingness to continue the fixed rental payments, the court held that the landlord's percentage participation in the fruits of the shoe business went to the heart of the contract, and therefore, payment of the fixed minimum would not satisfy legitimate expectations regarding fair performance.[109]

It is arguable that even where principles of good faith per-

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discontinued before the end of the lease term. 134 N.E.2d at 810.

[105] *See* Note, *supra* note 10, at 323.

[106] 52 Ill. App. 2d 449, 202 N.E.2d 49 (1964).

[107] 202 N.E.2d at 49, 50.

[108] *Id.* at 50.

[109] *Id.* at 51.

formance are applicable, a substantial minimum rent will limit the extent to which the lessee must consider the landlord's interests in making operational decisions. In *Parrish v. Robertson,*[110] a restaurateur was held to have acted in good faith when he terminated operations on the lessor's premises in order to have the advantage of a more lucrative location.[111] Under the rental agreement, he was obliged to pay a $250 minimum monthly rent plus ten percent of net profits.[112] While the premises had not proved unproductive, business returns had fallen short of the level contemplated.[113] The court noted that the tenant would not be obliged to remain in business were he losing money. It concluded that when the contemplated business does not fulfill reasonable expectations as to productivity, and the lease requires guaranteed rental payments which are substantially equivalent to fair rental values, basic fairness does not necessarily dictate continued operations.[114]

In the interest of preserving the percentage rental scheme, perhaps a presumption should arise that when business operations are productive, a sudden cessation of business indicates bad faith. Accordingly, a substantial fixed rent would tend to rebut this presumption; in cases like *Parrish,* chances are it would exonerate the lessee from further responsibility under the percentage agreement. This approach, unlike the bonus principle, would protect the proper functions of percentage leases while recognizing the economic realities of substantial minimum rent.

c. *Change in the Character of the Enterprise*

Frequently, instead of curtailing or completely discontinuing operations, the lessee will reduce his percentage rent by altering the fundamental character of the business. This maneuver may take one of two forms. Either the tenant will move the major business to another location and substitute a budget store on the demised premises, or he will simply change the use specified in the lease. The former, as one can readily see, offers an ideal opportunity to defeat the percentage agreement, since a bargain store will yield smaller returns and thereby dictate a proportionately lower rent. Moreover, the lessee is then in a position to seek a new landlord, one from whom he may gain more favorable lease terms. In the second situation, where the tenant merely shifts the productive use of the property, the transaction is more ambiguous. Perhaps, as in the budget store illustration, the tenant's motivation is a desire to achieve reduced rent, and the change will entail substitution of a less lucrative enterprise.

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[110] 195 Va. 794, 80 S.E.2d 407 (1954).

[111] 80 S.E.2d at 411.

[112] *Id.* at 408.

[113] *Id.* at 409-10.

[114] *Id.* at 411.

Assuming, however, that the original use proved unproductive, both lessor and lessee might benefit from substitution of a more promising business. Depending on the circumstances of the transaction, a change in the character of business conducted in the demised premises may or may not suggest bad faith on the part of the percentage lessee.

i. The Budget Store Problem

Changes in the nature of the business often are aimed at defeating the percentage agreement. In the classic model, the tenant successfully exploits the location, then elects to move the profitable activity, substituting in its place a business which will produce only nominal returns. Under those circumstances, the landlord is forced to accept decreased compensation while his contractual partner siphons the fruits of the enterprise. If the lessee's motives are purely selfish, courts may intervene in the name of assuring fair business conduct. An excellent illustration is furnished by *Selber Brothers v. Newstadt's Stores,*[115] in which the percentage lessee substituted a budget store for a profitable retail shoe business. The lessee's minimum rent was $200 monthly plus six percent of gross receipts.[116] For most of the lease term, the tenant stocked high quality merchandise, and percentage returns to the landlord were extremely high. Four months prior to the lease's expiration, the lessee moved this stock to another location and substituted a bargain basement operation at the demised premises.[117] In an action by the lessor, claiming breach of an implied duty to maintain the original business, the court found an obligation that the defendant "conduct his operations in plaintiff's premises for the *mutual benefit* of the parties to the contract, and in a manner consistent with good business principles in order that the lessor would realize the largest possible amount of rent over and above the stipulated minimum . . . ."[118] The court seemed to acknowledge that a quasi-partnership existed between the landlord and tenant, and that, in the absence of compelling reasons for change, this relationship compelled continuation of the type business originally contemplated.

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[115] 203 La. 316, 14 So. 2d 10 (1943).

[116] 14 So. 2d at 11.

Interestingly, in other cases dealing with the budget store problem, some courts have found a change of business to be an exercise of reasonable business judgment. In *Palm v. Mortgage Investment Co.*,[119] where a lucrative shoe business was moved out and a budget shop substituted, the court refused to find an implied covenant to operate a store of the original size and character. Such a covenant, the court reasoned, would unjustly "enlarge the express terms of the contract."[120] Similarly, in *Stern v. Dunlap*,[121] the Tenth Circuit ruled that substitution of a bargain center for a dry goods store dealing in high quality merchandise did not defeat the parties' legitimate expectations as to fair business conduct.[122] In *William Berland Realty Co. v. Hahne & Co.*,[123] the court found that "throughout the period of the lease, the parties acted in good faith."[124] The lease included a promise to use the premises for retail purposes and to pay the substantial fixed annual rent of $8,400 plus a percentage from gross sales.[125] Although sales and rental payments had increased steadily, defendant moved his current stock across the street, substituted lower priced items, and renamed the store "Hahne's Budget Shop."[126] The landlord charged violations of an implied duty not to change the class of business conducted on the premises, but the court found that the substitution had not obstructed the parties' percentage agreement.[127]

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[117] *Id.* at 11-12.

[118] *Id.* at 12 (emphasis added).

[119] 229 S.W.2d 869 (Tex. Civ. App. 1950).

[120] *Id.* at 874.

[121] 228 F.2d 939 (10th Cir. 1955).

[122] *Id.* at 943.

[123] 26 N.J. Super. 477, 98 A.2d 124 (1953), *aff'd per curiam,* 29 N.J. Super. 316, 102 A.2d 686 (1954).

[124] 98 A.2d at 130.

[125] *Id.* at 126.

The result in *Berland Realty* can best be justified by considering that, as in *Stern* and *Palm,* the contracting parties stipulated a substantial minimum rent. As in the cases concerning complete cessation of operations, one may reason that the lessee bargained for the discretion to change the contemplated method of operations in the event that the location proved unproductive. In none of the three cases, however, was there a showing that the premises had become unproductive, or that the diverted first-line merchandise would not have continued to produce reasonable returns. To the contrary, there was compelling evidence that all three enterprises were quite successful. A proper approach, therefore, might be to presume that where the premises prove productive, a change of operations which reduces the lessor's return imports bad faith. To rebut this presumption, the lessee would have only to show that the measures were dictated by reasonable business judgment and were not taken to reduce percentage rent.

ii. Change in Use

Changes in the productive use of the demised premises may be dictated by factors other than the desire to reduce percentage rent. If the hapless merchant, through no particular ineptitude or fault of his own, finds himself embroiled in a hopeless venture, he may wish to salvage part of his investment by effecting a change in business operations. While almost any modification would entail a departure from the business' originally contemplated operating conditions, it is possible that the lessor, too, would benefit from a change of use. Certainly, both the lessor's and the lessee's interests are served through the most productive exploitation of the demised property.

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[126] *Id.* at 127.

[127] *Id.* at 132. The court held that since there was no implied or express restrictive covenant in the lease, the store owner was not prohibited from changing, in good faith, the operation of his store. *Id.*

On the other hand, a change in use may signal an attempt by the lessee to diminish the landlord's percentage rent. One common illustration involves change from a business stressing volume, and its corresponding returns to the landlord through his share of gross receipts, to one in which increased profit margins are the major focus of concern. Another popular practice is for the lessee to convert the business from an income producing asset to a passive asset providing support for other property he owns. An example is provided by *Lippman v. Sears, Roebuck & Co.*[128] The tenant leased a building to conduct retail operations, agreeing to pay the lessor a minimum monthly rent of $285 plus a percentage of gross receipts.[129] Under the percentage provision, the landlord initially received over $17,000 in excess of the stated minimum; thus when Sears converted the premises from a retail outlet to a warehouse, he stood to lose substantially all of his rental return.[130] In a suit for damages based on violation of the lessee's implied obligation to maintain the character of the enterprise, the court, recognizing the nominal nature of the stated rent, held that the tenant must "continue in good faith" the business as originally contemplated.[131] The court's intervention, based on a commitment to assure fair business conduct, suggests that a change in the fundamental character of business operations, like a curtailment or discontinuance, must reflect more than a mere desire to reduce percentage rent.

d. Diversion of Sales

Alteration or discontinuance of business operations may be accompanied by a diversion of sales to premises not covered by the percentage lease. In such circumstances, the court must focus on the prior productivity of the enterprise in reaching a decision as to whether the change in operations was dictated by legitimate business considerations or whether it was part of a scheme to vitiate percentage rent. Similar considerations are applicable where diversion occurs without any overt change in business at the demised premises; there the court must determine whether the measure was a function of reasonable business expansion.

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[128] 44 Cal. 2d 136, 280 P.2d 775 (1955).

[129] 280 P.2d at 777.

[130] *Id.*

[131] *Id.* at 781. The court noted that implied covenants of continued use require a good faith effort to conduct the business in the way anticipated in the lease. *Id.* at 779.

i. Competition Against Oneself: The Multiple Locations Problem

The most frequent example of diversion is where the percentage tenant opens a new, competing business in the general vicinity of the demised premises. The maneuver is immediately suspect if the original business has been productive, and suspicion is confirmed when receipts at the prior premises decline. In *Masciotra v. Harlow,*[132] defendant rented property for operating a restaurant, "The Pump Room," promising to pay a monthly rent of $250 plus seven percent of gross receipts.[133] After successfully operating the business for several years, the lessee opened a new restaurant, transferring the distinctive "Pump Room" sign to the new site.[134] Patronage for the original restaurant declined, and shortly the landlord was receiving only the stipulated minimum rent.[135] He brought suit, alleging breach of an implied duty to make the contemplated enterprise mutually profitable. Refusing to recognize such an obligation, the court found that the defendant did not covenant to refrain from "open[ing] other restaurants during the term of the lease, nor [from operating] elsewhere under the name 'Pump Room,' nor [did he] agree not to change the name or character of the restaurant to be operated on plaintiff's premises."[136] Though the lessee's conduct included all the obvious elements of bad faith—previously productive location, diversion, and decreased sales and rents, the court considered the stipulated minimum and found the lessor's return was at all times "fair and adequate" and that the percentage rent was "in the nature of a bonus."[137] The reasoning suggests that as long as the lessor's return is "adequate," very little is required to justify a diversion of sales on the basis of reasonable business judgment.

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[132] 105 Cal. App. 2d 376, 233 P.2d 586 (1951).

[133] 233 P.2d at 588.

[134] *Id.*

[135] *Id.*

[136] *Id.* at 589.

Under some circumstances, the opening of a new and apparently competing retail outlet may be a function of reasonable business development. Assume, for example, that a supermarket chain begins operations in a small community, entering into a percentage lease for the starter store. If the venture proves profitable, it is reasonable for the company to establish other outlets in the same general area. While these new stores would appear to be competing with the starter business, close examination may indicate that they attracted their own patrons and did not necessarily siphon sales from the demised premises. This is essentially what occurred in *Food Fair Stores, Inc. v. Blumberg,*[138] where the court held that Food Fair's opening of three additional outlets in the same general area did not import an intent to divert business from the original store. Holding that the expansion was reasonable and consistent with good faith business conduct, the court found "no allegation of willful intent on the part of the lessee to divert sales from the lessor's store,[and no] abandonment of the business. There [was] nothing in the record that showed a lack of good faith or fair dealing by the lessee."[139] The court's reference to "willful intent" is perhaps misleading, since a decision concerning decreased percentage rent usually can be reached without reference to the tenant's actual state of mind. The decision seems justified, however, since there was no showing that business at the original location was appreciably diminished by the expansion.

In other situations, courts have determined that diversion was not a function of legitimate business judgment, but rather was effected to reduce or even eliminate the landlord's return. In *Goldberg, 168-05 Corp. v. Levy,*[140] the court held that a clothing merchant's diversion of sales to nearby premises had as its "sole purpose" the destruction of percentage rent.[141] The same reasoning was employed by the court in *Seggebruch v. Stosor*[142] to find that a gasoline operator acted unfairly when he reduced percentage rent by opening a second station on property adjacent to the demised premises.[143] In each case, the courts deemed it desirable to discourage unconscionable diversion and thereby to protect the legitimate functions of the percentage rental agreement. Arguably, the "sole purpose" standard relied on in the cases would not always produce this result, since it implies that, for the most part, the lessee can act to further selfish economic interests. A better view, perhaps, is the one already suggested—that percentage participation be treated as establishing a risk-sharing relationship somewhat akin to a partnership, under which the tenant's decisions must take into account the landlord's interests as well as his own. Under this view, the siphoning of sales from a productive business to a competing entity might in itself be presumptive of bad faith. As the following sections of this article indicate, this criterion can be applied to other forms of sales diversion.

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[137] *Id.; see* Percoff v. Solomon, 259 Ala. 482, 67 So. 2d 31, 34, 39 (1953) (diversion of sales allowed where lessee paid substantial minimum rent and lessor received percentage rent).

[138] 234 Md. 521, 200 A.2d 166 (1964).

[139] 200 A.2d at 174.

[140] 170 Misc. 292, 9 N.Y.S.2d 304 (Sup. Ct. 1938), *aff'd,* 256 A.D. 1086, 11 N.Y.S.2d

ii. Productive Departments and Diversion: The Tailored Woman Case

In diversified enterprises, such as discount houses and department stores, diversion may be manifested by the expansion of one department at the expense of another or by the elimination of a certain line of merchandise. While often prompted by legitimate business considerations, these intra-business maneuvers may give rise to a charge that the percentage tenant acted in bad faith. Where, for example, the proprietor of a woman's apparel store elects to move a lucrative fur department to premises not covered by the percentage lease, the landlord is likely to complain that the tactic was aimed primarily at reducing percentage rent. This is essentially what occurred in *Mutual Life*

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315 (1939).

[141] 9 N.Y.S.2d at 306.

[142] 390 Ill. App. 385, 33 N.E.2d 159 (1941).

[143] 33 N.E.2d at 161.

Insurance Co. v. Tailored Woman, Inc.,[144] where the court refused to imply a duty to operate the department in question on the main premises. The lease provided for a fixed rental plus four percent of gross receipts from sales "on, in or from" the demised premises.[145] Relying on the fact that the landlord's return had not been reduced, the court ruled that he was not due a percentage of sales at the new location. Reasoning that the expansion of other departments in the main store would compensate for the revenue lost from the fur department, the court concluded that the lessor was only entitled to a percentage of sales made on the main premises.[146]

Tailored Woman epitomizes the situation in which the unscrupulous tenant employs sales diversion to defeat the legitimate functions of a percentage agreement. Yet on those rather strong facts, the court refused to intervene to assure fair business conduct. It insisted, as in the multiple location cases, that bad faith is evidenced only where the practice complained of results in a reduction of percentage rent. This view, however, seems to ignore the basic difference between diversion through the establishment of a new, integrated enterprise and diversion by moving one division of an established enterprise to another location. In the latter situation, the tenant's motivation is not necessarily self-competition, since he probably prefers to maintain reasonable productivity at the original location. He does intend, however, that good will engendered in the leased premises be utilized to maximize sales at the new site. Under such conditions, it will be difficult, if not impossible, for the complaining landlord to establish that his percentage return actually was reduced.

As a solution to the "lucrative department" problem, courts might require that operations be maintained on the original premises in all cases except those in which removal is incident to reasonable business expansion. Unlike the *Tailored Woman* test, "reasonableness" would depend on the legitimate interests of the lessor as well as the lessee. Such an approach would protect the landlord's right to a return commensurate with the productivity of his property, while allowing the lessee to take appropriate measures in the event the premises become unsuited or inadequate for carrying out the original business operations.

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[144] 283 A.D. 173, 126 N.Y.S.2d 573 (1953), *aff'd*, 309 N.Y. 248, 128 N.E.2d 401 (1955).

[145] 126 N.Y.S.2d at 575.

[146] *Id.* at 577-78.

iii. Diversion Through Expansion

A slightly different problem arises when the tenant leases additional quarters which are adjacent to the demised premises but not subject to his percentage lease. There, even if the additional space is not utilized for an extraordinarily profitable activity, the court may find that it is part of the contemplated business and may require that receipts therefrom be included in the percentage rental base. For example, in *Cissna Loan Co. v. Baron,*[147] the lessee moved two productive departments into an adjoining building shortly after taking occupancy. The court found there was only "one" business operation and that on this basis, the claim for additional rent was justified. The court reasoned that since "[t]he entire business administration, the advertising, the going to and fro of the patrons of the store, [was] conducted in respondent's building,"[148] the lessor was entitled to a percentage of sales made in the additional space.[149] Thus, inasmuch as the lease provided that both parties would participate in returns from the department store, the court felt constrained to treat the expansion as a diversion.

A different approach was taken by the court in *Alstores Realty Corp. v. Twain.*[150] The tenant rented two contiguous tracts, constructing a department store on one and using the other for parking.[151] He paid the landlord a fixed minimum rent plus a percentage from the store's annual gross receipts.[152] After a few years, he enlarged the store, using both the landlord's property and adjoining land leased from another person.[153] Feeling that he was not obliged to pay percentage rent on sales allocable to the adjacent property, the lessee proposed that the lease be adjusted to provide for a lower percentage on all sales from the business.[154] As might have been expected, the lessor strongly opposed any reduction, arguing that increased sales occasioned by expansion were still attributable to the agreed-upon business.[155] In an action instituted by the lessee for declaratory relief, the court held that the landlord was entitled only to returns flowing from that portion of the store located on his property.[156] Citing *Tailored Woman,* the court ruled that the expansion did not entail "such unconscionable diversion of business from the percentage leased premises as was the situation in *Cissna Loan* . . . ."[157]

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[147] 149 Wash. 386, 270 P. 1022 (1928).

[148] 270 P. at 1024.

[149] *Id.*

[150] 167 So. 2d 601 (Fla. 1964).

[151] *Id.* at 602.

[152] *Id.*

[153] *Id.*

The contrariety of result in *Alstores* and *Cissna Loan* suggests that judicial efforts to develop a proper distinction between bad faith diversion and reasonable business expansion have not been entirely successful. While the *Alstores* decision rightly distinguishes a general expansion of operations to adjacent premises from a diversion thereto of a lucrative department, it gives little consideration to the legitimate functions served by percentage rental agreements. One of these functions is to promote the maximum development of business potential. Since the parties, particularly the lessor, bargain for returns based on that development, it is arguable that additional sales, whether produced by operational enlargement on the premises or in quarters next-door, form part of the base upon which percentage rent is to be computed. Such an approach would encourage full exploitation of the demised property and at the same time militate against the unconscionable diversion of sales to premises not covered by the percentage contract.

IV. CONCLUSION

This study suggests that the notion of good faith performance is not always effectively employed in resolving disputes under percentage leases. Despite the tendency of courts to eschew good faith language, this trend should not be attributed to a lack of agreement among jurists as to the need for protecting the legitimate expectations of fairness in carrying out and enforcing contractual obligations. It is almost universally recognized that when an individual agrees to confer a benefit upon another, he is obliged to do nothing which might substantially obstruct the enjoyment of that benefit. What is lacking, it seems, is a proper view of the nature and legitimate functions of the percentage lease.

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[154] *Id.* at 603.

[155] *Id.*

[156] *Id.*

[157] *Id.* at 604.

Unlike other contracts, wherein the parties' interests are widely divergent and their obligations are carried out accordingly, the percentage lease involves a mutual undertaking by the lessee and lessor. The lessee desires the security of a long term lease with the attendant advantages of reduced rent in times of business decline. Correspondingly, the lessor wishes to temper the effects of the business cycle and receive a return proportionate to the productive value of his property. The two, therefore, enter into an agreement to share the fruits of the designated business and to bear the consequences of its lack of success. The agreement is in substance, if not at times in form, a partnership—a partnership commenced with a view toward maximum exploitation of the leased property.

Among the loftiest of duties attributed to partners is the obligation to cooperate in good faith. Yet, to date, few courts have imposed this obligation on the lessor or the lessee, even when the latter used his advantageous position to destroy the landlord's return. Where courts do intervene, it usually is on the basis of an implied covenant to exert one's best efforts or to refrain from interference with the other's contractual entitlements. Rarely, if ever, are the partnership paradigms and the parties' mutual interest in developing the demised premises acknowledged. Thus, for lack of effective judicial intervention, the unscrupulous tenant is able to divert, modify, curtail, or even discontinue the business contemplated. To a large degree he does so without incurring liability to his landlord.

Perhaps, then, all would profit from judicial reassessment of the character and legitimate functions of percentage rental agreements. Certainly with respect to performance, it seems desirable that greater attention be focused on the legitimate interests of both the lessee and the lessor in assuring basic fairness in the conduct of business operations. Not inapplicable in this respect is the suggestion that the percentage lease be viewed not merely as a simple contract, but also as an important and increasingly prevalent form of commercial association. Arguably, such a view would encourage greater conformity with principles of good faith and fair business dealing, and, by the same token, lead to a liberalization of traditional notions of "free enterprise and look out for yourself."[158]

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[158] Burrows, *supra* note 31, at 405.

RIGHTS AND REMEDIES UNDER MISSISSIPPI'S NEW PUBLIC CONSTRUCTION BOND STATUTE

*Ron A. Yarbrough**

Introduction

In 1980, the Mississippi Legislature amended the statutes governing surety bonds on public construction projects.[1] The new law applies to contracts entered into on or after April 1, 1981 and to bonds made pursuant to those contracts.[2] The amended statutes radically change the former statutes both in terms of coverage and in the procedure required to claim the benefits of coverage.

First, it is important to understand the basic purpose of both the old and new statutes. They insure, by means of a surety bond, that work on public construction projects is completed as contracted and that persons providing labor and materials are paid.[3] This protection is vital in the absence of lien rights on public property.[4] Under prior law, if an individual provided labor or materials for use in a project and was not paid, he was allowed to intervene in and be made a party to any action instituted on the contractor's surety bond and to have his rights determined by the court. This right was subject to a prior claim and judgment by the obligee (*i.e.*, the public authority for whom the bond was given). Only after the obligee's claim was satisfied fully did the unpaid laborers and suppliers intervening in the suit share pro rata in the remainder.[5] If the obligee did not bring suit within six months from the completion and final settlement of the contract, a laborer or supplier was entitled to sue on his own behalf.[6]

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[1] Act of May 23, 1980, ch. 520, 1980 Miss. Laws 1230 (codified at MISS. CODE ANN. §§ 31-5-51 to -57 (Supp. 1980)) (repealing MISS. CODE ANN. §§ 31-5-1 to -13 (1972)).

[2] Act of May 23, 1980, ch. 520, § 6, 1980 Miss. Laws 1230.

[3] *Cf.* O'Neal Steel Co. v. Leon C. Miles, Inc., 187 So. 2d 19, 25 (Miss. 1966) (materialman who furnished materials to subcontractor allowed to bring suit for materials and labor furnished on public construction project); Mississippi Rd. Supply Co. v. Western Cas. & Sur. Co., 246 Miss. 510, 516-19, 150 So. 2d 847, 848-49 (1963) (statutes relating to surety bonds impose liability on the prime contractor to pay for all material and labor used in the public project); H.F. Vann Nieuwenhuyze & Sons Constr. Co. v. Irby, 232 Miss. 474, 477-78, 99 So. 2d 651, 652-53 (1958) (any person furnishing labor and materials used in the work may recover on the performance bond). *See generally* McManus, *The Miller Act Performance Bond—An Additional Payment Bond,* 1968 INS. L.J. 875, 875 (purposes of bonds are to protect the government against defective performance and to protect laborers and materialmen).

[4] *Cf.* Mississippi Fire Ins. Co. v. Evans, 153 Miss. 635, 652, 120 So. 738, 744 (1929) (laborers and materialmen have no lien against any public body for labor or materials

The new statute, patterned after the Federal Miller Act,[7] is commonly referred to as the "Little Miller Act." It provides unpaid laborers and materialmen more direct access to the courts. No longer are a claimant's rights derivative of or subordinate to the obligee's claim. Instead, the Act gives a direct cause of action on the payment bond if the claimant has not been paid within

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furnished on a public project absent a contract or statute to the contrary); National Sur. Co. v. Hall-Miller Decorating Co., 104 Miss. 626, 632, 61 So. 700, 702 (1913) (bond takes the place of mechanic's lien law since materialmen and laborers can have no lien on a public building).

[5] MISS. CODE ANN. § 31-5-1 (1972) (repealed 1980); *see* United States Fidelity & Guar. Co. v. Plumbing Whlsl. Co., 175 Miss. 675, 681-85, 166 So. 529, 530-31 (1936) (no action can be brought on the bond, except by the principal obligee, until six months after publication by the principal obligee that the contract has been completed).

[6] MISS. CODE ANN. § 31-5-5 (1972) (repealed 1980); *see* Day v. Royce Kershaw, Inc., 185 Miss. 207, 214-16, 187 So. 221, 223 (1939) (claim for attorney's fees incurred to enforce performance of the contract was allowed for suit brought after six month period had elapsed, but was denied for a prior suit brought during the six month period); *cf.* Walker Constr. Co. v. Construction Mach. Corp., 223 Miss. 145, 157, 77 So. 2d 712, 714 (1955) (suit brought by materialman before expiration of six month period was premature).

[7] 40 U.S.C. §§ 270a to 270d (1976), *as amended by* Act of Nov. 2, 1978, Pub. L. No. 95-585, 92 Stat. 2484 (1978). The purpose of the Miller Act is to protect persons supplying labor and materials for the construction of public projects. *See* United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 216 (1957) (health and welfare fund payments recovered under the Miller Act); United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947) (action against United States to recover contract price); United States *ex rel.* Edward Hines Lumber Co. v. Kalady Constr. Co., 227 F. Supp. 1017, 1018-20 (N.D. Ill. 1964) (action for wages where bond exhausted). Since a lien may not be placed on a public project, the Act is designed to give the same protection that state lien laws give to persons furnishing labor and materials for use in private construction. United States *ex rel.* Sherman v. Carter, 353 U.S. at 216.

ninety days after he last furnished labor or materials, provided he has complied with the applicable notice requirements.[8]

How a claimant becomes qualified to sue on the contractor's bond, the type of labor and materials covered by the bond, and how a claimant satisfies the notice requirements continue to be principal issues litigated at the federal level. These same issues are likely to be tested early under Mississippi's Little Miller Act. Consequently, the purpose of this article is to highlight some of the major similarities and differences between the Miller Act and the Little Miller Act by focusing on federal decisions construing the Miller Act and Mississippi decisions interpreting the old public bond statutes—decisions which are likely to be influential under the new act. In some instances Mississippi's highway contractors' bond statute[9] is used as a basis for interpretation because the Mississippi Supreme Court appears to have relied upon decisions construing the coverage of that statute to interpret the general (non-highway) public contractors' bond statute. Also, this article includes an analysis of the probable effects of the rather curious abatement provision found in section 35-5-51(2) of the Little Miller Act.

Background

The forerunner of the Federal Miller Act was the Heard Act,[10] which was identical in many respects to Mississippi's old public bond statutes. Both gave priority to the claims of the obligee by making a laborer's or supplier's suit on the contractor's bond derivative, unless six months had passed since completion or final settlement without the obligee having brought suit.[11] Like the Heard Act, the former Mississippi statutes required only one bond—a performance bond, with the additional obligation that the contractor pay laborers and suppliers.[12] The single limit performance bond, however, could be insufficient to protect laborers and materialmen when the obligee has substantial claims.

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[8] Miss. Code Ann. § 31-5-51(1), (2) (Supp. 1980).

[9] *Id.* § 65-1-85.

[10] Heard Act, ch. 280, 28 Stat. 278 (1894) (codified at 40 U.S.C. § 270 (1934) (repealed 1935)).

[11] *Id.;* Miss. Code Ann. § 31-5-5 (1972) (repealed 1980).

[12] Miss. Code Ann. § 31-5-5 (1972) (repealed 1980). These bonds are known as "single-limit" bonds, meaning that the surety company has at risk only a single penal amount (the contract amount) out of which all claims—performance or payment—must

In 1935, Congress enacted the Miller Act,[13] which replaced the Heard Act. Forty-five years later the Mississippi Legislature adopted the Little Miller Act,[14] which is in many respects substantially similar to its federal counterpart, but in other ways vastly different. Notwithstanding these differences, federal court decisions construing the Miller Act should serve as guideposts in interpreting some of the heavily litigated issues that doubtlessly will arise under Mississippi's Little Miller Act.

While the Miller Act covers contracts entered into with the federal government,[15] Mississippi's new act covers contracts entered into with "any state, county, city or political subdivision . . . or other public authority" for any construction or repair.[16] Both statutes require two bonds—a performance bond to protect the obligee and a payment bond to protect laborers and suppliers. Under the federal statute, these bonds are not required unless the contract exceeds a fixed amount (currently $25,000).[17] Where required, the payment bond must be a certain percentage, but not more than fifty percent, of the total project cost.[18] The new Mississippi statute, however, is broader. It covers *all*

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be satisfied.

[13] Act of Aug. 24, 1935, Pub. L. No. 74-321, §§ 1-4, 49 Stat. 793 (1935) (codified at 40 U.S.C. §§ 270a to 270d (1976 & Supp. II 1978)).

[14] Act of May 23, 1980, ch. 520, 1980 Miss. Laws 1230 (codified at Miss. Code Ann. §§ 31-5-51 to -57 (Supp. 1980)) (repealing Miss. Code Ann. §§ 31-5-1 to -13 (1972)).

[15] *See* 40 U.S.C. § 270a (Supp. II 1978) (bond must be furnished before any contract exceeding $25,000 is awarded by the United States to any person for work to be done on a project).

[16] Miss. Code Ann. § 31-5-51(1) (Supp. 1980). It should be noted that a contract between a prime contractor and his subcontractor, even on a public works project, is governed by the private bond statute, Miss. Code Ann. § 85-7-185 (1972). *See* Davis Co. v. D'Lo Guar. Bank, 162 Miss. 829, 845, 138 So. 802, 805 (1932) (application of bond filed by subcontractor on bridge contract was controlled by § 85-7-185 because the contract was between the subcontractor and the prime contractor, both private parties).

[17] 40 U.S.C. § 270a (1976 & Supp. II 1978) (minimum amount changed from $2,000 to $25,000 by amendment).

[18] *See id.* § 270a(2) (bond amount required is 50% of the contract amount for contracts of not more than $1,000,000; 40% of the contract amount for contracts of more than $1,000,000, but not more than $5,000,000; and for contracts of more than $5,000,000, the bond amount is $2,500,000).

public construction work regardless of cost and requires that the payment bond at least equal the amount of the contract.[19] Using identical language, both statutes apply to the "construction, alteration or repair of any public building or public work."[20]

Despite congressional intent to provide expanded protection for laborers and suppliers by repealing the Heard Act and adopting the Miller Act, courts have shown a definite reluctance to read too much into the Miller Act. For example, in *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*,[21] the United States Supreme Court said:

> The Miller Act . . . is highly remedial in nature. It is entitled to liberal construction and application in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects . . . . But such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds.[22]

With this background of the Miller Act in mind, the focus of this article now centers upon the interpretation of key passages substantially similar in the Federal Miller Act and Mississippi's Little Miller Act.

I. Labor and Materials

If the payment bond provision of Mississippi's Little Miller Act, like its federal counterpart, is intended to protect persons supplying labor and materials used in the prosecution of the work, a threshold question is: What constitutes "labor and materials"? An understanding of how federal courts have answered this question under the Miller Act and how the Mississippi Supreme Court has interpreted it under the old public bond statutes (as well as the state highway bond statutes) will be helpful in determining future interpretations under Mississippi's new act. Much of the interpretation of labor and materials under the Miller Act relies upon interpretation of those terms under the Heard Act. Similarly, the Mississippi Supreme Court's interpretation of labor and materials under the old bond statutes will be persuasive in resolving disputes under the Little Miller Act.

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[19] Miss. Code Ann. § 31-5-51(1)(b) (Supp. 1980).

[20] 40 U.S.C. § 270a (1976 & Supp. II 1978); Miss. Code Ann. § 31-5-51(1) (Supp. 1980).

[21] 322 U.S. 102 (1944).

[22] *Id.* at 107 (citation omitted).

Obviously most items of expense that go into a public works project are labor and materials, and they are covered by the contractor's surety bond. Interpretation problems—and disputes over bond coverage—arise in determining whether less obvious items are labor and materials. Rental expenses, maintenance costs, repairs, and workers' fringe benefits are the types of construction expenses that lead to litigation because they fail to fit readily under the heading "labor and materials."

Federal courts have had great difficulty in deciding what is and is not included under the heading "labor and materials." There is, as will be shown, authority to support many different positions on this issue. The purpose here is not to cite isolated cases as though they are generally accepted, but to give the reader an understanding of how different federal courts have dealt with this difficult question. For example, while acknowledging that each case must be considered carefully on its facts, the court in *United States ex rel. Watsabaugh & Co. v. Seaboard Surety Co.*[23] said that "anything that is indispensable to the work contracted for falls within the meaning of . . . labor and materials."[24] However, indispensability is but one of several tests.[25]

Clearly, wages due for labor performed on a project are covered by the Miller Act,[26] but the term "labor" is not limited solely to compensation for wages. Payments to an employees' health and welfare fund, where those payments are part of a collective bargaining agreement, have been held to be included under the meaning of labor as used in the Miller Act.[27] Freight and hauling charges of a shipper are also considered labor under the Miller Act.[28] Furthermore, work such as testing gravel for use in a road construction project has been held to be labor under the predecessor to the Miller Act.[29]

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[23] 26 F. Supp. 681 (D. Mont. 1938), *aff'd,* 106 F.2d 355 (9th Cir. 1939).

[24] 26 F. Supp. at 689.

[25] The kind of item supplied, whether it was partially or totally consumed, and whether it was supplied in good faith and was intended for the prosecution of the work are three other tests. These are discussed in the remainder of this section.

[26] United States *ex rel.* Edward Hines Lumber Co. v. Kalady Constr. Co., 227 F. Supp. 1017, 1021 (N.D. Ill. 1964) (wage claims under Miller Act are covered by performance bond where there has been an exhaustion of resources under payment bond); United States *ex rel.* Southern G-F Co. v. Landis & Young, 16 F. Supp. 832, 834 (W.D. La. 1935) (subcontractor may recover prevailing wage for work performed under Heard Act).

Deciding what is included under the meaning of "materials" is more difficult and involves subtle distinctions that have resulted in much litigation. For example, the Fifth Circuit has held that to come within Miller Act coverage, it is not necessary that the materials supplied actually be incorporated into the building or project being constructed.[30] There must be a reasonable belief on the part of the supplier that the materials were expected or intended to be used in the prosecution of the work, but it is not required that the materials be delivered to the prime contract job site.[31] Even where a supplier provided concrete which met a contractor's specifications but failed to meet a government-obligee's strength requirements, the supplier was allowed to recover on the contractor's surety bond.[32]

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[27] United States *ex rel.* Sherman v. Carter, 353 U.S. 210, 214 (1957). One issue addressed in *Carter* was the extent of liability of a surety on a payment bond furnished by a contractor. By contract, the employer agreed to pay an amount, fixed by an hourly rate, into a health and welfare fund. When any installment was not timely made, the employer was charged with liquidated damages. The Court held that the fund trustees had standing to sue under the Miller Act and indicated that:

> The Act, however, does not limit recovery on the statutory bond to 'wages.' The parties have stipulated that contributions to the fund were part of the consideration Carter agreed to pay for the services of laborers on his construction jobs. The unpaid contributions were a part of the compensation for the work to be done by Carter's employees. The relation of the contributions to the work done is emphasized by the fact that their amount was measured by the exact number of hours each employee performed services for Carter. Not until the required contributions have been made will Carter's employees have been 'paid in full' for their labor in accordance with the collective-bargaining agreements.

Id. at 217-18; *cf.* United States *ex rel.* West v. Peter Kiewit & Sons, 235 F. Supp. 500, 502 (D. Alaska 1964) (premiums for workmen's compensation insurance not covered).

[28] *See* Illinois Sur. Co. v. John Davis Co., 244 U.S. 376, 383 (1917) (loading and freight may be recovered under surety bond); Standard Accident Ins. Co. v. United States *ex rel.* Powell, 89 F.2d 658, 659 (5th Cir. 1937) (railroad carrier entitled to sue for freight), *aff'd,* 302 U.S. 442, 443-45 (1938); United States *ex rel.* Mariana v. Piracci Constr. Co., 405 F. Supp. 904, 906-07 (D.D.C. 1975) (delay cost for materials and labor covered).

[29] American Sur. Co. v. United States *ex rel.* Barrow-Agee Laboratories, Inc., 76 F.2d 67, 68 (5th Cir. 1935); *see* Sam Macri & Sons v. United States *ex rel.* Oaks Constr. Co., 313 F.2d 119, 123 (9th Cir. 1963) (subcontractor entitled to compensation for extra work on grading and excavation).

[30] *See* Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp., 396 F.2d 274, 276 (5th Cir. 1968) (materialman need not prove that his materials were actually used); United States *ex rel.* Lanahan Lumber Co. v. Spearin, Preston & Burrows, Inc., 496 F. Supp. 816, 817-18 (M.D. Fla. 1980) (tender of lumber and other goods with wrongful rejection

Miller Act protection often depends upon the nature of the item. For example, "capital equipment," defined as equipment which is not substantially consumed in the prosecution of the work, is not covered.[33] Also excluded from coverage are repair parts, appliances and accessories which add materially to the value of the equipment used on the job.[34] Lumber used for formwork, tools, and hardware, however, have been held to be material (instead of capital equipment) and are, therefore, covered, even though some portions might not be completely consumed in the prosecution of the work.[35] Repairs to equipment, if only minor and necessary to keep the equipment running and if consumed in the prosecution of the work, are covered by the Miller Act.[36]

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thereof will support a valid claim under the Miller Act).

[31] *See, e.g.*, United States v. National Sur. Corp., 268 F.2d 610, 611-12 (5th Cir.) (surety must stand liable under contract for rental equipment lost at sea), *cert. denied*, 361 U.S. 914 (1959); United States *ex rel.* Lanahan Lumber Co. v. Spearin, Preston & Burrows, Inc., 496 F. Supp. 816, 817-18 (M.D. Fla. 1980) (delivery to job site or actual use unnecessary); United States *ex rel.* I. Burack, Inc. v. Sovereign Constr. Co., 338 F. Supp. 657, 660 (S.D.N.Y. 1972) (same).

[32] *See* United States *ex rel.* Ardmore Concrete Material Co. v. Williams, 240 F.2d 561, 563-64 (10th Cir. 1957) (faulty directions and instructions).

[33] United States *ex rel.* Chemetron Corp. v. George A. Fuller Co., 250 F. Supp. 649, 660-62 (D. Mont. 1965).

[34] *See, e.g.*, Continental Cas. Co. v. Clarence L. Boyd Co., 140 F.2d 115, 116-17 (10th Cir. 1944) (repairs to dirt moving equipment not covered); United States *ex rel.* I. Burack, Inc. v. Sovereign Constr. Co., 338 F. Supp. 657, 661-62 (S.D.N.Y. 1972) (tools not covered).

[35] United States *ex rel.* Betts v. Continental Cas. Co., 224 F. Supp. 857, 859 (W.D. Pa. 1964).

[36] Illinois Sur. Co. v. John Davis Co., 244 U.S. 376, 383 (1917); Massachusetts Bonding & Ins. Co. v. United States *ex rel.* Clarksdale Mach. Co., 88 F.2d 388, 389-90 (5th Cir. 1937); Holloway & DuPont Dredging Co. v. Des Rocher & Watkins Towing Co., 57 F.2d 864, 864 (5th Cir. 1932); United States v. Hercules Co., 52 F.2d 454, 455-56 (S.D. Miss. 1931) (under Heard Act).

To simplify the distinction between materials and capital equipment, one court adopted an approach which "focuses on the degree of expected consumption of the items on the particular job for which they are furnished."[37] The court found that costs for tires supplied for use on heavy earth-moving equipment could be recovered under the contractor's bond because the supplier and the purchaser-contractor expected the tires to be substantially consumed in the course of the work. The court denied coverage for ordinary pickup truck tires that were used on trucks hauling materials to and from the job.[38]

Generally, leased equipment which is used or intended for use on a project comes under the meaning of materials as used in the Miller Act. For example, the rental costs of railroad cars, track, and equipment used in prosecuting the work have been held to be covered by the bond.[39] The equipment's fair rental value is the extent of liability under the Miller Act,[40] and liability continues only for the rental period in which the equipment is actually in use, not for the entire time it is left on the site.[41] The Miller Act does not apply to equipment purchased by a subcontractor under a conditional sales contract for use on a project.[42]

For repairs to rental equipment, Miller Act coverage extends to replace only those parts which were consumed in the prosecution of the work. If the repairs substantially increase the value of rented equipment and make it available for other work, then the costs of such repairs are not covered.[43] Likewise, repairs on non-leased equipment are generally considered materials and not capital equipment, provided they are consumable during the course of a project.[44]

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[37] United States *ex rel.* J.P. Byrne & Co. v. Fire Ass'n, 260 F.2d 541, 544 (2d Cir. 1958).

[38] *Id. Contra,* United States *ex rel.* Leonard Tire Co. v. Rayco, Inc., 616 F.2d 462, 463 (10th Cir. 1980) (tires and tire maintenance service covered).

[39] *See* United States *ex rel.* Mississippi Rd. Supply Co. v. H.R. Morgan, Inc., 542 F.2d 262, 265-69 (5th Cir.) (unpaid equipment rental and repair expenses covered), *cert. denied,* 434 U.S. 828 (1976).

[40] Massachusetts Bonding & Ins. Co. v. United States *ex rel.* Clarksdale Mach. Co., 88 F.2d 388, 389-90 (5th Cir. 1937).

[41] *See* United States *ex rel.* Carter-Schneider-Nebon, Inc. v. Campbell, 293 F.2d 816, 820-22 (9th Cir. 1961) (earth moving equipment); United States *ex rel.* Crane Serv. & Equip. Corp. v. Boston Steel Erection, Inc., 367 F. Supp. 699, 700-06 (D. Mass. 1973) (rental value of crane, labor, and materials).

[42] Massachusetts Bonding & Ins. Co. v. United States *ex rel.* Clarksdale Mach. Co., 88 F.2d 388, 389-90 (5th Cir. 1937); United States *ex rel.* Miller & Bentley Equip. Co. v. Kelly, 192 F. Supp. 274, 277-79 (D. Alaska 1961).

Other materials that have been held by some federal courts to be recoverable under the Miller Act, or its predecessor, but which might be distinguishable under other circumstances, include: groceries and other provisions furnished by a contractor for use in maintaining a boarding house for his laborers where no other accommodations were available;[45] material which was supplied but was so damaged in transit that it could not be installed;[46] and fuel supplied with the good faith intention that it was for equipment used in the prosecution of the work but diverted to other uses.[47] It should be noted that financing arrangements are outside Miller Act protection. Therefore, money, even though borrowed and used to pay for labor or materials, is not covered by the Miller Act; thus, a lender is prevented from recovering on the bond even where the loan was used to purchase labor and materials.[48]

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[43] *See, e.g.,* Continental Cas. Co. v. Clarence L. Boyd Co., 140 F.2d 115, 116 (10th Cir. 1944) (repair parts not recoverable).

[44] *See* note 36 and accompanying text *supra.*

[45] *See, e.g.,* Brogan v. National Sur. Co., 246 U.S. 257, 263 (1918) (contractor provided board and lodging for laborers at isolated construction site); Equitable Cas. & Sur. Co. v. Helena Whlsl. Grocery Co., 60 F.2d 380, 384 (8th Cir. 1932) (laborers' camp established along levee construction site located in comparative wilderness).

[46] *See* United States *ex rel.* National U.S. Radiator Corp. v. D.C. Loveys Co., 174 F. Supp. 44, 48-49 (D. Mass. 1959) (surety liable to seller of damaged air-conditioner coils unfit for installation), *aff'd sub nom. on other grounds,* A. Belanger & Sons, Inc. v. United States *ex rel.* National U.S. Radiator Corp., 275 F.2d 372 (1st Cir. 1960).

[47] *See* Glassell-Taylor Co. v. Magnolia Petroleum Co., 153 F.2d 527, 529 (5th Cir. 1946) (surety liable for fuel used in trucks hauling gravel even though fuel not wholly consumed in project); *cf.* United States *ex rel.* Carlson v. Continental Cas. Co., 414 F.2d 431, 433 (5th Cir. 1969) (inconsequential for recovery under bond that materials delivered in good faith were diverted for other uses); Riley-Stabler Constr. Co. v. Westinghouse Elec. Corp., 396 F.2d 274, 277 (5th Cir. 1968) (furnished material may be diverted and not used in project covered by bond, but good faith intention that material was supplied for project must be shown).

[48] *See* Hardaway v. National Sur. Co., 211 U.S. 552, 561 (1909) (surety for contractor who was unable to complete lock and dam project was not liable to third party expending own funds to complete contractor's obligations); Bill Curphy Co. v. Elliott, 207 F.2d 103, 109 (5th Cir. 1953) (loan to subcontractor for cleanup crew's payroll not covered by bond).

These federal court interpretations of "labor and materials" as used in the Miller Act and in its predecessor are considerably different from interpretations of those terms as used in Mississippi's old public works contractors' statutes[49] and highway contractors' bond statutes. Now that the Little Miller Act has become effective, the Mississippi Supreme Court will likely rely upon interpretations of "labor and materials" under the old statutes because those terms actually appear in the old statutes.[50] In cases involving unsettled issues, however, interpretation under the Miller Act may control. In any event, it seems especially important to recognize the limits of coverage that result from the different interpretations of these terms as used in the respective federal and state statutes.

The foregoing federal interpretation of labor and materials under the Miller Act included a holding that coverage extends to whatever is "indispensable to the work contracted for."[51] No such broad interpretation has ever been employed by the Mississippi Supreme Court. In fact, in an early decision, *United States Fidelity & Guaranty Co. v. Yazoo County ex rel. Rings,*[52] the court set the stage for subsequent narrow interpretations by stating:

> [T]he statute . . . is designed for the protection of those who furnish materials which either enter into and become a permanent part of the improvement, or which are naturally and necessarily consumed in the course of the performance of the work, and it was not intended to protect those who furnish the contractor's plant and equipment or who furnish the material necessary to keep such equipment upon an efficient basis.[53]

Under this view, the court allowed a creditor's claim for gasoline, but disallowed a claim for such items as hammers, wrenches, and other tools. Even though these items were completely worn out on the job, the court held that the liability of a surety for such items was not determined by whether they were partially or totally worn out or consumed on a job. One year earlier in *Standard Oil Co. v. National Surety Co.*,[54] the court allowed recovery for gasoline and oil used by a contractor to run his equipment, reasoning that although the gas and oil did not go into or become part of the structure it was used in the prosecution of the work.[55] Perhaps the court's allowance of recovery for gasoline and its denial of coverage for items of equipment is founded solely upon its express desire to avoid court determinations of equipment depreciation.[56]

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[49] MISS. CODE ANN. § 31-5-1 (1972) states that "[a]ny person who has furnished labor or materials . . . and [where] payment has not been made shall have the right to . . . be made a party to any action instituted on [a public works] bond." *See id.* § 65-1-85 (1972 & Supp. 1980) (providing method of awarding contracts by or on behalf of the state highway commission).

[50] *Id.* § 31-5-1 (1972); *id.* § 65-1-85 (1972 & Supp. 1980).

[51] *See* notes 23 through 25 and accompanying text *supra.*

[52] 145 Miss. 378, 110 So. 780 (1927).

[53] *Id.* at 386, 110 So. at 781.

For the same reason that claims for tools and similar items were rejected in *Yazoo County,* the Mississippi Supreme Court refused recovery for rental and freight charges on a dragline used by a contractor to dredge a ditch. The disallowance was made on the basis that these charges did not fit the statutory meaning of materials.[57] Courts have held to the contrary in Miller Act cases.[58]

Interestingly, the old Mississippi statute has been interpreted to cover feed for mules and groceries furnished to a subcontractor for a workers' camp because board was part of the workers' compensation and because there was no other nearby place to eat.[59] However, groceries and merchandise furnished to a commissary operated by a contractor for profit, but allegedly operated only to aid the contractor's workers, were held not covered by the statute.[60]

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[54] 143 Miss. 841, 107 So. 559 (1929).

[55] *Id.* at 855-56, 107 So. at 560.

[56] *See* 145 Miss. at 386-87, 110 So. at 781. The court stated that it was not the intention or meaning of the statute that a surety should be liable for equipment worn out on a particular contract. If such were the case, a surety would be liable for the depreciation in value of the equipment, and the court would be required to determine the amount of depreciation. *Id.* Gasoline, such as that supplied in *Standard Oil,* cannot be worn out performing a contract; it can be used only once.

[57] Watts v. Western Cas. & Sur. Co., 210 Miss. 211, 217, 49 So. 2d 255, 257 (1951); *see, e.g.,* Carruth v. Standard Accident Ins. Co., 329 F.2d 690, 693 (5th Cir. 1964) (bond coverage of labor and materials did not include equipment rentals); Carter Equip. Co. v. Travelers Indem. Co., 409 F. Supp. 1008, 1010 (S.D. Miss.) (prime contractor's payment bond did not carry obligation to pay rental on equipment), *aff'd,* 520 F.2d 941 (5th Cir. 1975); McElrath & Rogers v. W.G. Kimmons & Sons, 146 Miss. 775, 791, 112 So. 164, 166-67 (1927) (rental of tractor used in road construction not secured by bond). *Compare* Great Am. Ins. Co. v. Busby, 247 Miss. 39, 52-53, 150 So. 2d 131, 137 (1963) (surety not liable for rental and freight charges on equipment in construction of housing units at Air Force base) *with* Shuptrine v. Jackson Equip. & Serv. Co., 168 Miss. 464, 468, 150 So. 795, 796 (1933) (Mississippi's highway construction bond statute, § 65-1-85, held to include equipment rental). *Contra,* Houston Gen. Ins. Co. v. Maples, 375 So. 2d 1012, 1016 (Miss. 1979) (rentals for heavy equipment essential to improving construction site, as required under contract, held covered by bond).

[58] *See* notes 39, 40 and accompanying text *supra.*

Unlike the Miller Act, the old Mississippi bond statute excluded equipment repairs.[61] Consistent with the Miller Act, the former bond law included lumber used to make concrete forms, provided any value remaining after such use was deducted from the surety's liability.[62] The surety's liability did not, however, extend to claims for personal items such as cigarettes, clothes, or money loaned to workers,[63] or even for money loaned to a subcontractor and used by him to purchase material or to pay laborers.[64]

A more recent Mississippi decision evidences the court's inclination to broaden the old statute's scope of coverage for materials. In the 1927 case of *United States Fidelity & Guaranty Co. v. Yazoo County ex rel. Rings* the court said the statute covers "materials which either enter into and become a part of the improvement or which are naturally and necessarily consumed in the course of the performance of the work."[65] In 1979, however, the court in *Houston General Insurance Co. v. Ma-*

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[59] McElrath & Rogers v. W.G. Kimmons & Sons, 146 Miss. 775, 790, 112 So. 164, 164, 166 (1927) (claim for supplies furnished non-profit commissary allowed); *see* Maryland Cas. Co. v. Gottsche, 18 F.2d 582, 582 (5th Cir. 1927) (feed for animals used in grading work for highway construction constituted material covered by the bond).

[60] Watkins v. United States Fidelity & Guar. Co., 138 Miss. 388, 397-99, 103 So. 224, 226-27 (1925) (claims for goods sold for profit at boarding house in well-settled area not covered by bond).

[61] *See* McElrath & Rogers v. W.G. Kimmons & Sons, 146 Miss. 775, 788, 112 So. 164, 165 (1927) (repairs on equipment not covered under MISS. CODE ANN. § 31-5-1 (1972)).

[62] *See* McElrath & Rogers v. W.G. Kimmons & Sons, 146 Miss. 775, 790, 112 So. 164, 166 (1927) (although lumber not wholly consumed in project, claim still allowed).

[63] *Id.* at 790-91, 112 So. at 166.

[64] *See* Oliver Constr. Co. v. Crawford, 142 Miss. 490, 500-01, 107 So. 877, 879 (1926) (no coverage when plaintiff only signed note to a third party enabling subcontractor to borrow money to pay for materials and labor).

[65] 145 Miss. at 386, 110 So. at 781.

ples[66] allowed recovery for rental expenses for heavy equipment because the equipment was "essential to improving the construction site . . . just as laborers would have been had the equipment not been used."[67] The court's essentiality test (also applied in the same case to find that fuel was covered by the bond) is reminiscent of the "indispensability" test applied by the Supreme Court in *United States ex rel. Watsabaugh & Co. v. Seaboard Surety Co.*[68]

Perhaps just as surprising in *Maples* was the court's reversal of the lower court's full allowance of coverage for tires and repairs to tires which were used on heavy equipment. A remand was ordered to determine "the tires' useful life and the portion thereof that was consumed on this contract."[69] This implies that a useful life formula should be applied to determine what portion of an item was consumed and, therefore, what portion is recoverable under the bond. The court's reversal and remand directly follow its finding that the bond "does not extend to payment for equipment or major repairs with the capability of use on other projects."[70] The court's decision appears to signal a more liberal interpretation of labor and materials, even to the extent of sanctioning court-determined depreciation of equipment.[71]

II. PARTIES COVERED BY THE ACT

Even a careful reading of the Miller Act and the Little Miller Act could lead one reasonably to believe that every person furnishing labor or materials for use on a project is covered. This is not true. With an exception in the Mississippi statute for laborers performing work on the job site, coverage under both acts extends only to persons in privity of contract with the prime contractor and persons having a "direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond,"[72] provided this latter group satisfies the notice requirements.[73] In other words, one who lacks privity with the contractor providing the bond must have a direct contractual relationship with a subcontractor in order to sue on the bond. Characterization of the parties, therefore, is of principal importance, and, as might be expected, this characterization has generated much controversy under the Miller Act. Also, because the right of action provided by the Little Miller Act is almost identical to that provided by the Miller Act, attorneys bringing or defending actions under Mississippi's new act should consider how courts have characterized various parties under the federal act.

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[66] 375 So. 2d 1012 (Miss. 1979).

[67] *Id.* at 1016.

[68] *See* notes 23, 24 and accompanying text *supra*.

[69] 375 So. 2d at 1016.

[70] *Id.*

[71] The court's willingness to embark on a judicial determination of equipment depreciation is contrary to its earlier position in United States Fidelity & Guar. Co. v. Yazoo County *ex rel.* Rings, 145 Miss. 378, 378, 110 So. 780, 781 (1927). *See* notes 52 through 56 and accompanying text *supra*.

A landmark case, *Clifford F. MacEvoy Co. v. United States ex rel. Calvin Tomkins Co.*,[74] dealt with the question of which parties are covered under the Miller Act. *MacEvoy* involved a suit on the prime contractor's bond brought by one who supplied materials to the prime contractor's supplier. The prime contractor had paid his supplier, but the payment failed to be passed down the chain. Thus, the second supplier was an unpaid creditor. The issue was "whether under the Miller Act a person supplying materials to a materialman of a government contractor and to whom an unpaid balance is due from the materialman can recover on the payment bond executed by the contractor."[75] The Court's conclusion that such a person may not recover is important because Mississippi's Little Miller Act follows the language upon which the Court based its decision. The Court said:

> [The Miller Act] makes clear that the right to bring suit on a payment bond is limited to (1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers and sub-subcontractors who,

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[72] 40 U.S.C. § 270b(a) (1976); Miss. Code Ann. § 31-5-51(3) (Supp. 1980).

[73] 40 U.S.C. § 270b(a) (1976); Miss. Code Ann. § 31-5-51(3) (Supp. 1980) (person must give written notice to contractor or surety within 90 days from date work was performed).

[74] 322 U.S. 102 (1944).

[75] *Id.* at 104.

> lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor . . . ."[76]

The Court further developed an important working definition of the term subcontractor as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen."[77] This definition and rationale seem consistent with congressional intent as illustrated by a statement made during hearings prior to passage of the Miller Act: "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond."[78] Under this analysis, the plaintiff in *MacEvoy* was a materialman to a materialman of the prime contractor and, therefore, was too remote to be covered by the bond.

MacEvoy evidences that the degree of remoteness from the prime contractor is critical to the determination of coverage under the contractor's bond. A brief survey of selected post-*MacEvoy* decisions is helpful in seeing where and how courts draw the line on coverage. For example, in *Basich Brothers Construction Co. v. United States ex rel. Turner*[79] a prime contractor engaged a company to furnish labor, supplies, and equipment necessary to haul gravel from land leased by the prime contractor for use in a road building project. The prime contractor paid the gravel hauler's payroll, and the plaintiff furnished trucks to the hauler. Liability of the prime contractor's surety depended upon whether the gravel hauler was a subcontractor. The court held that, under the definition developed in *MacEvoy,* the gravel hauler was a subcontractor. Thus, the plaintiff was allowed to recover on the prime contractor's bond.[80] The court's holding was based upon a finding that the gravel hauler took from the prime contractor a specific part of the labor and materials requirement, thereby making it a "subcontractor," instead of a materialman. Therefore, the plaintiff was entitled to recover as a supplier to a subcontractor.[81]

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[76] *Id.* at 107.

[77] *Id.* at 109.

[78] H.R. REP. No. 1263, 74th Cong., 1st Sess. 3 (1935).

[79] 159 F.2d 182 (9th Cir. 1946).

[80] *Id.* at 183.

In another case,[82] a prime contractor entered into an agreement with a manufacturer who was to supply and deliver millwork to the prime contractor as required under a specific part of the contract. The manufacturer, in turn, issued purchase orders to a milling company to furnish certain doors. When the milling company was not paid by the manufacturer, it sued on the general contractor's bond. The court characterized the manufacturer as a subcontractor, instead of a materialman, enabling the milling company to recover.[83]

In *Brown & Root, Inc. v. Gifford-Hill & Co.*[84] a prime contractor purchased sand and gravel from a company which, in turn, bought sand and gravel from another supplier but failed to pay for it. This ultimate supplier was denied recovery because the court characterized the prime's supplier of sand and gravel as a materialman.[85] Had the ultimate supplier furnished material to a subcontractor, instead of the prime contractor's materialman, recovery would have been proper under the Miller Act.

The Miller Act also provides coverage for one who sells and delivers material to a subcontractor in good faith and under the reasonable belief that it is intended for ultimate use under the prime contract, even though it is later diverted or not incorporated into the project.[86] Some courts have held, however, that the lessor of equipment intended for use by the lessee as a subcontractor on a government works project cannot recover on the prime contractor's bond if the lessee never came to final terms with the prime contractor and never actually performed any work or acquired the status of a subcontractor.[87]

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[81] *Id.*

[82] United States *ex rel.* Hardwood Prods. Co. v. John A. Johnson & Sons, 137 F. Supp. 562 (W.D. Pa. 1955).

[83] *Id.* at 564.

[84] 319 F.2d 65 (5th Cir. 1963).

[85] *Id.* at 66, 69.

[86] *See* notes 30, 31 and accompanying text *supra.*

[87] United States *ex rel.* Mario Pandolf Co. v. Nassif, 194 F.2d 912, 913-14 (1st Cir.

Courts frequently discuss remoteness from the prime contractor in terms of "tiers" of subcontractors. For example, in *Elmer v. United States Fidelity & Guaranty Co.*,[88] a prime contractor sublet grading and asphalt paving to a subcontractor who subsequently contracted the work to another company. The paving subcontractor, with full knowledge of the prime contractor, employed Elmer to inspect and test its work. When the paving subcontractor became bankrupt before paying him, Elmer sued on the prime contractor's bond. Adopting the Supreme Court's definition of subcontractor, the Court of Appeals for the Fifth Circuit held that Elmer's employer, the paving subcontractor, was not a subcontractor for Miller Act purposes because it performed its work for the paving/grading subcontractor of the prime contractor, and not directly for the prime contractor.[89] Therefore, Elmer was not a subcontractor within the meaning of the Miller Act, and because he did not have a direct contractual relationship with a subcontractor, he could not recover on the bond.

In *United States ex rel. Jonathan Handy Co. v. Deschenes Construction Co.*[90] a prime contractor engaged a subcontractor to perform portions of its contract. The subcontractor contracted with a construction company to whom the plaintiff furnished materials to perform part of its subcontract. Holding that the plaintiff could not recover, the court said the claimant had a contractual relationship with only the construction company which had no contractual relationship with the prime contractor.[91]

A different result from that in *Elmer* and *Handy* appears to have been reached in *McGregor Architectural Iron Co. v. Merritt-Chapman & Scott Corp.*[92] The defendant, a prime contractor, subcontracted a portion of the main contract to a party whom the court characterized as a "first subcontractor." This "first subcontractor" contracted a portion to a "second subcon-

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1952).

[88] 275 F.2d 89 (5th Cir.), *cert. denied,* 363 U.S. 843 (1960).

[89] 275 F.2d at 90.

[90] 188 F. Supp. 270 (D. Mass. 1960).

[91] *Id.* at 272.

[92] 150 F. Supp. 323 (M.D. Pa. 1957).

tractor," who contracted a portion to the plaintiff, a "third subcontractor." In holding that the plaintiff ("third subcontractor") was not too remote and did not fall outside Miller Act coverage, the court distinguished its finding from that in *MacEvoy* on the ground that this "third subcontractor" performed on the site an integral part of the main contract. Therefore, he was part of what the court in *MacEvoy* described as one of "relatively few subcontractors who perform part of the original contract" and who are covered by the prime contractor's bond.[93]

Another district court rejected the first, second, and third subcontractor denomination of *McGregor* and substituted the designation "sub," "sub-sub," and "sub-sub-sub." *United States ex rel. Newport News Shipbuilding & Dry Dock Co. v. Blount Brothers Construction Co.*[94] involved a prime contractor, its subcontractor, and its sub-subcontractor with whom the plaintiff dealt. By contracting with a "sub"-subcontractor, the plaintiff became a "sub-sub"-subcontractor and was one tier away from coverage under the bond. The court held that Miller Act coverage did not extend to one who furnished or contracted to furnish labor and materials to a sub-subcontractor.[95]

Because so much depends upon the classification of the party with whom the bond claimant deals, Supreme Court decisions after *MacEvoy* have attempted to clarify the meaning of "subcontractor." In *F.D. Rich Co. v. United States ex rel. Industrial Lumber Co.*,[96] the Court applied what seemed to be a functional test. According to the Court, the correct test for determining whether one is a subcontractor is "the substantiality and importance of his relationship with the prime contractor,"[97] for this usually will determine whether the prime contractor can protect himself by requiring bond security from his subcontractors.

A later decision, *J.W. Bateson Co. v. United States ex rel.*

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[93] 322 U.S. at 110.

[94] 168 F. Supp. 407 (D. Md. 1958).

[95] *Id.* at 411. Recall the Court's statement in *MacEvoy* limiting the right to recover under a Miller Act payment bond. See text at note 76 *supra*.

[96] 417 U.S. 116 (1974).

[97] *Id.* at 123-24.

Board of Trustees,[98] refines the definition of subcontractor. In *Bateson,* employees of a sub-subcontractor sued on the prime contractor's bond for amounts withheld from their wages by their employer which were to be deposited in the employees' pension fund but were not. These employees had a contract only with their employer, a sub-subcontractor, and in order for them to recover, it was necessary to convince the Court that the term "subcontractor," as used in the Miller Act, encompasses a firm that is actually a sub-subcontractor.[99] Approving the definition of subcontractor established thirty-three years earlier in *MacEvoy*—"one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract,"[100] the Court held that a prerequisite to being a subcontractor is having a contract with a prime contractor.[101] Finding that the employees did not have a contract with a subcontractor under this definition, the Court added that the term "subcontractor must be limited in meaning to one who contracts with a prime contractor."[102] Equally important, the Court further stated that Congress knew the difference between sub-subcontractors and subcontractors and intended to limit the scope of payment bond protection to subcontractors.[103]

Shortly thereafter, the Third Circuit Court of Appeals applied the Supreme Court's *Bateson* directive and denied recovery to a third tier subcontractor who had no contractual ties with the prime subcontractor or the prime contractor.[104] The Third Circuit also concluded in *United States ex rel. K. & M. Corp. v. A. & M. Gregos, Inc.* that *Bateson* "rules out a holding that the Court may look to the functions carried out by contracting parties, rather than to the position they occupy in the contractual structure, to identify the first tier contractor."[105] In that instance the plaintiff was urging the court to ignore an entire tier of subcontractors because they neither provided labor nor materials, but simply subcontracted work down the line to another tier. Had the court eliminated this level, the plaintiff would have had a contract with a first tier subcontractor and would have recovered.[106]

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[98] 434 U.S. 586 (1978).

[99] *Id.* at 587-88.

[100] *Id.* at 590 (quoting MacEvoy Co. v. United States *ex rel.* Calvin Tomkins Co., 322 U.S. at 109).

[101] 434 U.S. at 594.

[102] *Id.*

[103] *Id.*

[104] *In re* Garden State Erectors, Inc., 599 F.2d 1279, 1281 (3d Cir. 1979) (per curiam).

[105] 607 F.2d 44, 47 (3d Cir. 1979).

Although considerable litigation has developed over the issue of who is covered by the Miller Act, court decisions have not been entirely consistent. The foregoing discussion is intended only to point out some tests which courts have used in determining which parties are covered. *MacEvoy,* requiring one not in privity with the prime contractor to have a direct contractual relationship with a subcontractor, is clearly the all-important starting point. Subsequent decisions, such as *Bateson* which adds to the definition of subcontractor the requirement of a contract with the prime contractor, are only spokes on the *MacEvoy* hub, and undoubtedly other spokes will be added as questions concerning Miller Act coverage continue to be litigated.

In contrast with the federal statute, the drafters of Mississippi's Little Miller Act appear to have eliminated some of the uncertainty that plagues the federal act over the limits of coverage. Unlike its federal counterpart, the new Mississippi statute delineates the parties protected. Judicial guidelines and definitions construing the federal act, however, should still be considered when questions of interpretation arise under the Little Miller Act. For example, in *MacEvoy* the Supreme Court construed statutory language very close to that in the new Mississippi act.[107]

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[106] *Id.* at 45-47.

[107] Compare the following quotation from *MacEvoy,* limiting the right to bring suit on a Miller Act payment bond to "(1) those materialmen, laborers and subcontractors who deal directly with the prime contractor and (2) those materialmen, laborers, and sub-subcontractors who, lacking express or implied contractual relationship with the prime contractor, have direct contractual relationship with a subcontractor and who give the statutory notice of their claims to the prime contractor," 322 U.S. at 107-08, with the Mississippi act which provides that "[t]he only persons protected by such payment bond, subject to the notice provision of this section, are: (a) Subcontractors and material suppliers of the contractor; (b) Sub-subcontractors and material suppliers of those subcontractors named in sub-section (4)(a) of this section; and (c) Laborers who have performed work on the project site," MISS. CODE ANN. § 31-5-51(4) (Supp. 1980).

The Honorable Vardaman Dunn, in his excellent work *Federal and State Statutory and Case Law Pertinent to Construction Contract Claims and Litigation—Suits on Public Bonds and Suits on Private Bonds,* said:

> In respect to the more remote relationships, the state law is far more liberal toward the supplier than the federal application of the Miller Act on federal projects. The Mississippi Court reaches this result in emphasizing the legislative purpose to provide payment to all who supply labor or material which finds its way into the work. This extremely liberal view disregards the problems which plague the prime contractor in attempting to protect himself against claims on his bond by unknown remote materialmen. Moreover, the adverse effect upon the prime contractor is compounded by the absence in state statutes of any requirement of notice to the prime contractor as a condition precedent to his liability on the bond to remote suppliers. This involves the prime contractor in the hazard of double payment where a subcontractor is unbonded and fails to pay his bills.[108]

The new Mississippi statute provides the relief that Dunn complained was lacking in the former statute, for Mississippi's Little Miller Act not only limits claims by remote materialmen,[109] but also requires that they give notice to the prime contractor in order to perfect their claims and their right to maintain an action under the statute.[110]

III. THE REQUIREMENT OF NOTICE

Neither the Miller Act nor the Little Miller Act requires persons who deal directly with the prime contractor to give the prime notice of their potential claims in order to perfect their right to sue on his bond. The prime contractor's obligations to these people are obvious because he has dealt with them directly. However, a limited group of potential claimants—who lack an express or implied contractual relationship with the contractor on whose bond they are suing—is also covered by the

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[108] 1976 Miss. Law Institute 113, 130.

[109] MISS. CODE ANN. § 31-5-51(4) (Supp. 1980).

[110] *Id.* § 31-5-51(3).

Miller Act and its Mississippi counterpart, provided the notice requirement is satisfied. The terms of the notice requirement are identical in both statutes:

> Any person . . . shall have a right of action . . . upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed.[111]

This ninety day notice provision enables the prime contractor to learn of potential or real liabilities of his subcontractors so that he can withhold sufficient funds from the subcontractor to satisfy the claims of those who give notice.

The method of giving notice under the two statutes differs somewhat, most notably because the new Mississippi statute allows notice to be given to either the contractor or surety, while notice under the federal act must be directed to the contractor only.[112] This alternate method of giving notice under the Mississippi statute seems to involve the surety more closely in the affairs of its principal—at least where the surety receives the notice.

The sufficiency of the manner of giving notice under the federal statute was challenged in *Fleisher Engineering & Construction Co. v. United States ex rel. Hallenbeck.*[113] In that case written notice was sent by regular mail rather than by certified mail as required by the statute. Because one of the joint contractors received the notice, its receipt and content were not challenged. Only the manner in which it was sent was challenged. In holding the notice adequate under the statute, the Court said:

> [W]e think that a distinction should be drawn between the provision explicitly stating the condition precedent to the right to sue and the provision as to the manner of serving notice

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[111] 40 U.S.C. § 270b(a) (1976); Miss. Code Ann. § 31-5-51(3) (Supp. 1980).

[112] 40 U.S.C. § 270b(a) (1976); Miss. Code Ann. § 31-5-51(3) (Supp. 1980).

[113] 311 U.S. 15 (1940).

> . . . . We think that the purpose of this provision as to the manner of service was to assure receipt of the notice, not to make the described method mandatory so as to deny right of suit when the required written notice within the specified time had actually been given and received.[114]

The adequacy of the method of giving notice was also at issue in a Fifth Circuit decision, *United States ex rel. Birmingham Slag Co. v. Perry,*[115] in which the court of appeals held that notice sent by regular mail, but received in time and otherwise sufficient, satisfied the requirements of the Miller Act.[116] Subsequently, in *Liles Construction Co. v. United States ex rel. Stabler Paint Manufacturing Co.*[117] the same court found notice sufficient under the Miller Act where a supplier sent a prime contractor two letters dated one day apart, and one letter was not sent by registered mail and contained an over-estimated amount. The court concluded that when read together the letters were sufficient to give the contractor notice.[118]

Unlike the rather lenient position which some federal courts have adopted on the issue of notice, there is ample reason to believe that the Mississippi Supreme Court will take a more stringent view of the notice required by the Little Miller Act, if their decisions in other areas are indicative. For example, the court took a literal view of the notice of publication provision in the old statute—even to the extent of finding the notice requirement jurisdictional.[119]

Courts have likewise avoided strict construction of the Miller Act's requirement that the notice accurately state the amount of the claim and identify the party failing to pay. For example, in *Coffee v. United States ex rel. Gordon*[120] the supplier visited one of the prime contractors, gave him a written statement containing claims against the subcontractor, and advised him of the amount claimed. The Fifth Circuit found that the prime contractor had notice sufficient under the circumstances.[121] In another case, the same court found that a materialman had substantially complied with the statute when he had given the general contractor verbal notice of claims followed by a written confirmation.[122]

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[114] *Id.* at 18-19.

[115] 115 F.2d 724 (5th Cir. 1940).

[116] *Id.* at 726.

[117] 415 F.2d 889 (5th Cir. 1969).

[118] *Id.* at 891.

[119] *See* United States Fidelity & Guar. Co. v. Plumbing Whlsl. Co., 175 Miss. 675, 685-86, 166 So. 529, 531 (1936) (publication of completion or abandonment of contract essential to cause of action); *cf.* Euclid-Mississippi v. Western Cas. & Sur. Co., 249 Miss. 547, 554-57, 163 So. 2d 676, 679-80 (1964) (material supplier-claimant caught in "notice trap").

[120] 157 F.2d 968 (5th Cir. 1946).

Although there has been leniency on the part of some courts to find that notice timely given was also sufficient in terms of content, there is consensus that at the least the notice must have been actually intended as such and that it be sent to and reach the general contractor as notice of a claim. In *United States ex rel. J.A. Edwards & Co. v. Thompson Construction Corp.*,[123] the Court held:

> [T]he notice which the Miller Act requires . . . must show it was intended to be the presentation of a claim, a claim against the contractor and its surety by the laborer or materialman in the latter's own right . . . [and] it must state with substantial accuracy the amount claimed to be owing the laborer or materialman on the project and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. If it meets these simple and basic requirements no degree of formality is needed.[124]

Assuming that the contents and the manner of serving the notice are sufficient, what must one do to satisfy the timeliness requirement? In *United States ex rel. Engineering & Equipment Co. v. Wyatt*,[125] a supplier shipped the last items he furnished a certain subcontractor on September 26, 1957, and the subcontractor received them on September 27, 1957. The supplier filed his Miller Act notice on December 26, 1957, ninety-one days after the date of final shipment. The court held that the final item was not "furnished or supplied" under the Miller Act's meaning until it actually reached the subcontractor and, furthermore, under rule 6(a) of the Federal Rules of Civil Procedure, the first day for giving notice (the day the goods were received) is not counted and the last day is counted. Therefore, the supplier's notice was effective on the ninetieth day, which enabled it to recover on the bond.[126]

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[121] *Id.* at 970.

[122] Houston Fire & Cas. Ins. Co. v. United States *ex rel.* Trane Co., 217 F.2d 727, 730 (5th Cir. 1954).

[123] 273 F.2d 873 (2d Cir. 1959), *cert. denied,* 362 U.S. 951 (1960).

[124] 273 F.2d at 876.

[125] 174 F. Supp. 260 (N.D. Fla. 1959).

Courts have also held that when a qualified claimant sends notice by registered mail on the ninetieth day and the general contractor receives it on the ninety-first day, such notice is effective.[127] In addition, if a supplier's letter is received within the ninety day period it is effective even though the delivery date stated in the letter is incorrect.[128] Furthermore, if material sent to a subcontractor is so defective that it cannot be used but is instead returned to the manufacturer, the ninety day period begins anew from the date that proper material is later shipped.[129]

It is difficult to develop specific rules to cover most instances involving a question of timeliness. There are, however, a few areas in which there seems to be some general agreement. For example, if a subcontractor has an open account with his supplier and the supplier furnished material on more than one occasion, the ninety days for filing notice do not begin to run until the date that the last material was furnished. Therefore, a claim timely filed covers material furnished to the subcontractor under the entire contract for open account.[130] In contrast, where the last delivery of several orders occurred on October 31, 1956, the ninety day notice period expired on January 29, 1957, and was not revived by a subsequent order and delivery.[131]

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[126] *Id.* at 261.

[127] United States *ex rel.* Crowe v. Continental Cas. Co., 245 F. Supp. 871, 873-74 (E.D. La. 1965).

[128] United States *ex rel.* A. & J. Friedman Supply Co. v. M.S.I. Corp., 246 F. Supp. 337, 339 (D.N.J. 1965).

[129] United States *ex rel.* General Elec. Co. v. Gunnar I. Johnson & Son, 310 F.2d 899, 903 (8th Cir. 1962).

[130] Noland Co. v. Allied Contractors, Inc., 273 F.2d 917, 920 (4th Cir. 1959); *see* United States *ex rel.* Chemetron Corp. v. George A. Fuller Co., 250 F. Supp. 649, 658-59 (D. Mont. 1966) (where series of contracts involved, notice was timely when given within 90 days of date the last materials were furnished); United States *ex rel.* A. & J. Friedman Supply Co. v. M.S.I. Corp., 246 F. Supp. 337, 340 (D.N.J. 1965) (same); United States *ex rel.* J.A. Edwards & Co. v. Bregman Constr. Corp., 172 F. Supp. 517, 522 (E.D.N.Y. 1959) (same).

The court in *United States ex rel. J.A. Edwards & Co. v. Bregman Construction Corp.*[132] said:

> If the material is so furnished pursuant to one entire contract, obviously the measuring date will be the date when the last material is so furnished. If the material is furnished pursuant to a series of separate contracts, the measuring date will be the date when the last material is furnished under the last contract. This is the internal sense of the Miller Act. It should be construed sensibly and its plain purposes should not be defeated by a narrow interpretation.[133]

Finally, a discussion of the ninety day notice provision should include an analysis of the statute of limitations provisions of both the old and new Mississippi statutes and the Federal Miller Act. The federal statute gives persons who furnish labor or material and who have not been paid in full before the expiration of ninety days "the right to sue on such payment bond for the amount."[134] The federal statute further provides that no "suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied."[135] By comparison, Mississippi's Little Miller Act states clearly that "[e]very person who has furnished labor or material used in the prosecution of the work . . . and who has not been paid in full therefor before the expiration of a period of ninety (90) days . . . shall have the right to sue on such payment bond," subject to meeting the other qualifications of the statute.[136] Section 31-5-53 of the Mississippi act, however, states just as clearly that the "time for the institution of said action shall not begin to run until" the obligee publishes notice of final settlement or abandonment by the contractor.[137]

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[131] United States *ex rel.* J.A. Edwards & Co. v. Peter Reiss Constr. Co., 273 F.2d 880, 881-82 (2d Cir. 1959), *cert. denied,* 362 U.S. 951 (1960); *see, e.g.,* United States *ex rel.* General Elec. Co. v. H.J. Lewis Constr. Co., 375 F.2d 194, 201-02 (2d Cir. 1967) (if more than 90 days between deliveries under series of purchase orders, later shipment cannot revive Miller Act liability for previous shipments); United States *ex rel.* I. Burack, Inc. v. Sovereign Constr. Co., 338 F. Supp. 657, 660-61 (S.D.N.Y. 1972) (same).

[132] 172 F. Supp. 517 (E.D.N.Y. 1959).

[133] *Id.* at 522.

[134] 40 U.S.C. § 270b(b) (1976).

[135] *Id.*

[136] Miss. Code Ann. § 31-5-51 (Supp. 1980).

Although the vesting of the cause of action and the time within which such cause of action must be brought are unambiguous under the Miller Act, the above quoted language of the new Mississippi act is subject to at least two competing interpretations. For example, does Mississippi's Little Miller Act mean that a qualified claimant may actually sue on the ninety-first day? Or does it provide that only the right to sue vests in the claimant on the ninety-first day, requiring him to wait until the obligee publishes notice of either final settlement or abandonment before suing on his claim? The most likely interpretation is that the legislature intended that a party need *not* wait until publication of final settlement or abandonment before bringing suit, but that suit could be brought on the ninety-first day. This interpretation is based upon the introductory heading of the bill, describing as its purpose to "establish a right to sue after ninety days where labor or materials have been provided."[138] In addition, Representative Hainon Miller, a member of the House committee where the bill originated, remembers that "the sense of the committee was definitely to give claimants a speedier cause of action than existed under the old statute."[139]

In other words, under the old statutes, publication of either complete performance and final settlement or abandonment marked the earliest date for bringing suit, as well as the date for measuring the one year limitation period within which suit on the bond could be brought.[140] Under the new act, publication of completion or abandonment continues as the date for measuring the one year limitation period, but a party need not wait for either performance and final settlement, or abandonment, for his claim to ripen into a right to sue.[141] If this interpretation is accepted, the new act will provide a speedier cause of action while retaining the one year period within which to prosecute that cause.

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[137] *Id.* § 31-5-53.

[138] Act of May 23, 1980, ch. 520, 1980 Miss. Laws 1230.

[139] Interview with Representative Hainon Miller of Greenville, Mississippi, March 6, 1981.

[140] Miss. Code Ann. § 31-5-7 (1972) (repealed 1980).

[141] *Id.* § 31-5-53 (Supp. 1980).

Judicial interpretation of the publication provision may be troublesome because the new act carries over from the old statutes the specified occurrence from which time the limitation period begins—"said time for the institution of said action shall not begin to run until the obligee shall have made said final settlement or determined said abandonment and published notice thereof . . . ."[142] Therefore, it is important to determine how that phrase has been construed in Mississippi. For example, the Mississippi Supreme Court has held that notice of either final settlement or abandonment must first be published before the cause of action arises, before courts acquire jurisdiction, and before the limitation period begins to run.[143] Also, final settlement may be made by means other than final payment, but the period for bringing suit does not begin until publication is effective.[144]

IV. ABATEMENT UNDER MISSISSIPPI'S LITTLE MILLER ACT

Perhaps the most curious provision in Mississippi's Little Miller Act is the last sentence of section 31-5-51(2), which provides: "Notwithstanding anything to the contrary contained herein, if the amount claimed in such action is subject to contractual provisions or conditions, between the parties involved in such action, the action shall be abated pending the performance of such provisions and the fulfillment of such conditions."[145]

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[142] *Id.*

[143] Transamerica Ins. Co. v. Paine Supply Co., 194 So. 2d 490, 490-91 (Miss. 1967); Euclid-Mississippi v. Western Cas. & Sur. Co., 249 Miss. 547, 558-59, 163 So. 2d 676, 681 (1964); United States Fidelity & Guar. Co. v. Plumbing Whlsl. Co., 175 Miss. 675, 685, 166 So. 529, 531 (1936).

[144] MISS. CODE ANN. § 31-5-53 (Supp. 1980). A very recent case under the old statutes, Western Cas. & Sur. Co v. Honeywell, Inc., 380 So. 2d 1385 (Miss. 1980), held that a provision in a public construction surety bond requiring claimants to give written notice to certain parties within 90 days of supplying the last of the materials is not against public policy, even if the claimant's failure to comply with the provision takes away its right to sue before the one year statute of limitations period has expired. The Mississippi Supreme Court characterized the 90 day notice provision as a necessary condition precedent to maintaining a suit which relates "only to things to be done by Honeywell as a supplier of a sub-contractor before Western Casualty became liable to Honeywell." *Id.* at 1389.

[145] MISS. CODE ANN. § 31-5-51(2) (Supp. 1980).

Just what constitutes a "contractual provision or condition" within the meaning of the statute will almost certainly be the subject of substantial litigation. In the construction industry, especially where public construction projects are involved, contracts and subcontracts are filled with "contractual provisions and conditions."[146] Therefore, the abatement provision creates pitfalls for payment bond claimants that are inconsistent with the statute's larger purpose—to provide quick and effective access to payment bond coverage. Although courts have not yet interpreted the abatement provision, it appears to give both principal and surety a legitimate means of delaying bond exposure until conditions are satisfied or disputes concerning contract conditions and performance are resolved between the claimant and principal.

The following hypothetical situation indicates what might be the practical effect of the above-quoted statutory language. Assume that a supplier provides material to a subcontractor for use on a public works project in Mississippi. The subcontractor refuses to pay for all or part of the material, alleging that it is defective or was delivered late. When the supplier sues on the payment bond, the surety may rely upon the abatement provision in the new Mississippi act and delay the action pending the resolution of the dispute between the supplier and the subcontractor.

Had this hypothetical action been brought under the Federal Miller Act, the rights and defenses of the supplier and the subcontractor could have been determined in the same suit which determined the surety's liability to the unpaid supplier.[147]

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[146] The American Institute of Architects' Document A401, 1978, Standard Form of Agreement Between Contractor and Subcontractor, contains a number of general conditions to which, it could be argued, claims are normally subject. Some examples are: provisions relating to defective work, ¶ 11.7.1; changes in the work ordered by the contractor, ¶ 11.9.1; damages to the subcontractor caused by the prime contractor's delay, ¶ 11.10.1; arbitration, ¶ 13.1; and, of course, payments by the prime contractor to the subcontractor, ¶ 12.4.1. Even when A.I.A. forms are not used, it is common for construction agreements to contain similar provisions and conditions.

[147] *See* Indemnity Ins. Co. v. Browning-Ferris Mach. Co., 227 F.2d 804, 809 (5th Cir. 1955) (surety allowed to file cross-claim); United States *ex rel.* Foster Wheeler Corp. v. American Sur. Co., 142 F.2d 726, 728 (2d Cir. 1944) (counterclaim allowed where based upon breach of contract); *cf.* United States *ex rel.* D'Agostino Excavators, Inc. v. Hey-

Under Mississippi's Little Miller Act, the supplier might first have to perfect his claim against the subcontractor—that is, prove the fulfillment or performance of conditions and provisions in one action, in order to sue on his claim against the surety in another action. In other words, the new Missisippi act may be interpreted to mean that performance and fulfillment of provisions and conditions of the contract underlying the claim are conditions precedent to determining the surety's liability on the payment bond, and further that any action brought on the bond may be abated until all such disputes are resolved.

Arbitration provisions commonly found in construction contracts, especially contracts between the owner and the prime contractor and between the prime contractor and subcontractor, should also be mentioned in this context. The following standard American Institute of Architects subcontract provision is typical:

> All claims, disputes and other matters in question arising out of, or relating to, this Subcontract or the breach thereof, shall be decided by arbitration, which shall be conducted in the same manner and under the same procedure as provided in the Contract Documents with respect to disputes between the Owner and the Contractor, except that a decision by the Architect shall not be a condition precedent to arbitration.[148]

When claims against the surety are based upon underlying contracts which contain arbitration provisions, the surety may be able to abate any action on the bond pending an outcome of the arbitration—something that could require months.

Under the Federal Miller Act the worthiness of an unpaid laborer's or supplier's claim is determined in the same action that determines the surety's liability for the claim.[149] Under Mississippi's Little Miller Act, if the abatement provision is invoked, a surety's liability may be determined only after the principal's liability is established in a separate action. Depending upon how it is interpreted, this abatement provision, with its po-

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ward-Robinson Co., 430 F.2d 1077, 1082 (2d Cir. 1970) (to hold otherwise would result in multiplicity of suits and fragmentation of litigation).

[148] American Institute of Architects, *supra* note 146, at ¶ 31.1.

[149] *See* note 147 *supra*.

tential for built-in delays, could have the most far-reaching effect of all provisions of the Act. Also, it is possible that the legislature, notwithstanding its desire to provide a speedier cause of action for unpaid laborers and suppliers, actually placed an obstacle in the path of those claimants by including the abatement provision in the Little Miller Act.

V. CONCLUSION

This article admittedly has not attempted to discuss every section of Mississippi's Little Miller Act, its predecessor statute, nor the Federal Miller Act. It should, however, be pointed out that the pertinent part of the Little Miller Act relating to attorney's fees provides that the trial judge may award attorney's fees if he finds that the action was brought by the claimant in bad faith or that a defense raised by a contractor or surety was unreasonable, in bad faith, or for the purpose of delaying payment of the claim.[150] This section, however, does not affect the right to recover attorney's fees where a contract or bond includes such a provision.[151] Also, venue under the Little Miller Act appears to be greatly expanded,[152] for the act provides that venue shall lie in the county where the contract or some part of the contract was performed or where service of process may be had on either the surety on the bond or its principal.[153]

Because the major battles in public contractor bond cases have been fought over the interpretation of labor and materials, the parties who are covered by the statutes, and the adequacy and timeliness of notice prior to suit—an area that may be particularly important under the new Mississippi act, these areas were selected for detailed discussion. In addition, this article analyzed some likely effects of the abatement provision contained in section 31-5-51(2) of the Little Miller Act, which may become particularly significant.[154]

For laborers and suppliers, the Little Miller Act may prove to be a vast improvement over the protection afforded by the present statute. At least that was the intention of its drafters. Like its federal counterpart, the Little Miller Act was intended to provide claimants with a speedier and more direct cause of action, rather than a derivative cause or one that ripens after six months in order to give the government/obligee first chance at recovery under the bond. For the obligee, the new act provides greater assurance of both performance of the contract and payment to those who provide labor and materials. For contractors and their sureties, the new act eliminates what has been called "the hazard of double payment"[155] by requiring ninety days notice from claimants.[156] It may also provide sureties with an effective good faith delay tactic.

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[150] MISS. CODE ANN. § 31-5-57 (Supp. 1980).

[151] *Id.*

[152] *Cf. id.* § 11-11-3 (1972) (venue in county where cause of action arose).

[153] *Id.* § 31-5-53 (Supp. 1980).

[154] *Id.* § 31-5-51 (Supp. 1980).

The federal act and Mississippi's Little Miller Act share a certain degree of similarity in defining the parties who are covered by the contractor's surety bond. They also share similarity in terms of their respective notice requirements. The greatest area of divergence—other than the abatement provision—appears to be in the interpretation of, and therefore in the coverage provided by, the terms "labor and materials," with more claims being allowed under the federal act. If the *Houston General Insurance Co.*[157] decision is any indication of future trends, however, the Mississippi Supreme Court may be interpreting labor and materials, as used in the Little Miller Act, more broadly.

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[155] *See* note 108 and accompanying text *supra*.

[156] MISS. CODE ANN. § 31-5-51(2) (Supp. 1980).

[157] *See* notes 66, 67 and accompanying text *supra*.

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1980 MISSISSIPPI SUPREME COURT REVIEW

ADMINISTRATIVE LAW

The Administrative Law section of the Supreme Court Review addresses eleven general areas of the law. These areas are worker's compensation,[1] taxation,[2] elections,[3] zoning,[4] education,[5] state and local government contracts and expenditures,[6] civil service,[7] health,[8] marine conservation,[9] private organizations,[10] and attorney misconduct.[11] The Mississippi Supreme Court decided cases in each of these areas during 1980.

I. WORKER'S COMPENSATION

A. Course of Employment: Aiding Strangers

In *Big "2" Engine Rebuilders v. Freeman*,[12] the Mississippi Supreme Court ordered compensation for a route salesman injured while aiding an apparent motorist in distress.[13] The court reiterated standards evolved from prior case law governing interpretation of the statutory language[14] "injury arising out of and in the course of employment."[15] It was conceded, however, that no Mississippi precedent controlled the particular facts of this case.[16] The decision rested on the humanitarian quality of the claimant's activity,[17] and also upon the "positional risk" theory of worker's compensation. Under this theory, liability attaches when the employment brings the worker to a place where the occasion for aid is observed.[18] A corollary of this principle is that liability ensues when an employer may reasonably foresee that his traveling employee would make such a stop to render aid.[19]

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[1] *See* notes 12 through 63 and accompanying text *infra.*

[2] *See* notes 64 through 79 and accompanying text *infra.*

[3] *See* notes 80 through 90 and accompanying text *infra.*

[4] *See* notes 91 through 96 and accompanying text *infra.*

[5] *See* notes 97 through 113 and accompanying text *infra.*

[6] *See* notes 114 through 131 and accompanying text *infra.*

[7] *See* notes 132 through 136 and accompanying text *infra.*

[8] *See* notes 137 through 146 and accompanying text *infra.*

[9] *See* notes 147 through 152 and accompanying text *infra.*

[10] *See* notes 153 through 158 and accompanying text *infra.*

[11] *See* notes 159 through 167 and accompanying text *infra.*

[12] 379 So. 2d 888 (Miss. 1980).

[13] The claimant was en route to his next stop when he was flagged down by a man beside an automobile with its hood raised. The man pointed a gun behind claimant's ear and then apparently struck him in the head. There was no dispute concerning either the severity of the injuries received, or the compensability of injuries caused by the intentional torts of a third person. *Id.* at 889.

[14] MISS. CODE ANN. § 71-3-3(b) (1972) provides in part: " 'Injury' means accidental injury . . . arising out of and in the course of employment . . . and also includes an injury caused by the willful act of a third person directed against an employee because of his employment while so employed and working on the job."

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[15] "Arising out of" calls for some causal connection between the employment and the injury, but the employment need not be the sole cause of the injury. Rather, it is sufficient if the employment rationally contributes to the injury. Prince v. Nicholson, 229 Miss. 718, 726, 91 So. 2d 734, 737 (1957); *see* Charles N. Clark Assocs. v. Robinson, 357 So. 2d 924, 929 (Miss. 1978) (the reasonable relation of employment and injury may require a lesser degree of causation than needed in tort case).

The "in the course of" test is met when the injury results from an activity which is: (1) in its overall contours actuated at least in part by a duty to serve the employer or (2) reasonably incidental in the employment. V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 178 (2d ed. 1967).

More specifically, traveling salesmen are in the course of their employment when the work creates the necessity of travel, even though the employee is at the same time serving some purpose of his own, Durr's Dependents v. Schlumberger Oil Well Surveying Co., 227 Miss. 606, 614, 86 So. 2d 507, 509 (1956), and the activity of a traveling salesman must be viewed in its entire context. E & M Motel Management, Inc. v. Knight, 231 So. 2d 179, 183 (Miss. 1970). Similarly the statute's language—"because of his employment"—was interpreted to require "simply a rational connection of employment and injury." 379 So. 2d at 890-91.

[16] The court converted the lack of a directly negative precedent into a useful springboard to its decision: "[T]his Court has never denied compensation to an employee injured as a result of a good faith attempt to render aid to a stranger actively soliciting such aid at a place the employment required the employee to be." 379 So. 2d at 891. Of course, neither did the court cite such a case where compensation had been awarded.

[17] *Id.* at 891-92.

[18] 1A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 28.23 (1979). In O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504 (1951), the Supreme Court ordered compensation for employees who drowned while attempting a water rescue near their employer's property. The Court stated:

> All that is required is that the "obligations or conditions" of employment create the "zone of special danger" out of which the injury arose . . . . A reasonable rescue attempt . . . may be "one of the risks of the employment, an incident of the service, foreseeable, if not foreseen, and so covered by the statute."

Id. at 507. Larson points out that the "positional aisle" theory is found in its purest form in the *O'Leary* case, and that, presumably, an office worker on the third floor would be compensated for injuries received in rescuing a victim of a street accident viewed below, since the employment would have provided the contact between the employee and the rescue opportunity. A. LARSON, *supra*, at § 28.23.

[19] 379 So. 2d at 891. Arguably, the reasonable foreseeability of his employee's contact with and response to any given emergency would serve to limit the reach of the

Although it reached a liberal result, the court blurred somewhat the exact criteria on which its ruling was based.[20] Heavy reliance was placed on the United States Supreme Court's decision in *O'Leary v. Brown-Pacific-Maxon, Inc.*,[21] a case involving a life or death rescue.[22] Most courts in other jurisdictions have allowed compensation in factual situations similar to the case at bar.[23] The Mississippi court, however, failed to specify whether the possible good-will benefit to the employer in the instant case was a material element in its holding,[24] and whether courteous aid of a stranger stands on the same footing as a genuine rescue.[25]

In dissent, Justice Cofer took issue with several aspects of the court's decision, including the majority's assertion that it was a question of fact whether the claimant was injured in the course of his employment.[26]

B. *Violation of Child Labor Laws: Agriculture or Manufacturing?*

In *Dependents of Stafford v. United States Cattle Corp.*,[27] the Mississippi Supreme Court held that a minor who was killed while lev-

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positional risk theory as posed by A. LARSON, *supra* note 18, § 28.23. In the instant case, the court had no difficulty in reaching the conclusion that stopping to aid a distressed motorist was "an acknowledged incident of being on the road." 379 So. 2d at 891.

[20] Among the elements in the court's analysis were: the humanitarian aspects of the case, the positional risk theory, the active solicitation of aid by the motorist, the foreseeability to the employer of the employee's rendering such aid, the lack of contrary instructions from the employer, the relatively insignificant deviation either spacially or temporally from the delivery route, the possible goodwill to the employer, the fact that the opportunity was literally "thrown into" the claimant's path, and the lack of a contrary holding. 379 So. 2d at 891-92.

Of course, it would be unfair to expect the court to announce precisely how these factors would weigh in any given future case. Their respective weights in the instant case are clear.

[21] 340 U.S. 504 (1951).

[22] *See* note 18 *supra.*

[23] *See generally* A. LARSON, *supra* note 18, §§ 27.10-29.22.

[24] The court mentioned that aiding a motorist could be helpful to an employee selling rebuilt engines and parts, but did not specify the weight given to this consideration. 379 So. 2d at 891.

[25] The court used life or death rescue cases in supporting its decision. *Id.* at 891-92.

[26] *Id.* at 892-94 (Cofer, J., dissenting). Justice Cofer, citing Wilson v. International Paper Co., 235 Miss. 153, 157, 108 So. 2d 554, 555 (1959), stated that in worker's compensation cases, as in other cases, if the facts are not in dispute, the matter for decision is one of law. 379 So. 2d at 894 (Cofer, J., dissenting). *But see* Barry v. Sanders, 211 Miss. 656, 661, 52 So. 2d 493, 495 (1951) (issue of whether a claimant was assaulted because of his employment was factual and to be determined by the jury).

[27] 389 So. 2d 923 (Miss. 1980).

eling corn in a silo was not engaged in manufacturing, so that double benefits for a violation of the state's child labor laws were not recoverable.[28] The court applied the definition of manufacturing given in a prior Mississippi case[29] and found that the decedent's activity did not fit one element of that definition because he was not in the process of substantially changing a raw product.[30] The decedent's work was deemed instead to be entirely agricultural.[31]

The decision unfortunately contained a glaring misapplication of the definition upon which the court purportedly relied. The case from which the definition was taken stated that the raw product must undergo processing which renders it different to *some* extent.[32] But, in the instant case, the decision was based on the fact that the harvested grain was not converted into a substantially different substance.[33] Strict application of the former definition might well have yielded a different result.

The court was understandably reluctant to set a precedent under which a farming operation might be defined as one engaged in manufacturing. The court, however, could have easily reached the same result by using the definition of manufacturing given in a still earlier case:[34] "an organized force of laborers working with machinery."[35]

C. *Reimbursement for Spouse's Nursing Services*

In *Babcock & Wilcox Co. v. Smith,*[36] the court held that a paraplegic claimant could be compensated for non-technical services, such as bathing, clothing, and aiding with claimant's exercise program, which services were rendered by his wife in the home.[37] Relying on the authority of *Graham v. City of Kosciusko*,[38] the court stated that services over and above those normally performed by a wife must be compensated because the unrewarded burden placed on his family would prevent the claimant from being made whole.[39]

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[28] *Id.* at 926. Double compensation benefits under MISS. CODE ANN. § 71-3-107 (1972) may be recovered if a minor's employment violates the provisions of the Mississippi labor laws, among which is § 71-1-17, forbidding employment in a manufacturing establishment in excess of certain hours.

[29] Lopanic v. Berkeley Coop. Gin Co., 191 So. 2d 108 (Miss. 1966). This case announced that three essential elements constituted manufacturing: (1) a raw material, (2) a process whereby the original material is changed or transformed, (3) a substance which by reason of the process is to some extent different from the original. *Id.* at 112-13.

[30] 389 So. 2d at 925.

[31] *Id.* at 926.

[32] Lopanic v. Berkeley Coop. Gin Co., 191 So. 2d 108, 112-13 (Miss. 1966).

[33] 389 So. 2d at 925-26.

[34] Buckeye Cotton Oil Co. v. State, 103 Miss. 767, 60 So. 775 (1913).

[35] *Id.* at 787, 60 So. at 777. This definition is used in 48A AM. JUR. 2d *Labor and Labor Relations* § 2642, at 788 (1968). Legislative response to the outcome of this case could include amending the labor laws to forbid employment of children in dangerous occupations or those which pose a danger to life and limb. *See id.* § 2661, at 796 (such statutes are not unconstitutionally vague).

[36] 379 So. 2d 538 (Miss. 1980).

D. Claimant's Duty to Seek Other Employment

The facts in *Pontotoc Wire Products Co. v. Ferguson*[40] showed that a claimant, who was disabled from further employment in the type of industrial environment which caused his disability, had made several attempts at gaining other types of employment.[41] The court held that the claimant had established a prima facie case of impaired earnings "in the same *or other* employment,"[42] and that the employer had failed to rebut this with evidence showing that employment suited to his condition was locally available.[43]

E. Liability in Tort: Dual Employment

In *Ray v. Babcock & Wilcox Co.*,[44] a claimant brought a personal injury suit in circuit court against Babcock & Wilcox Company, the subcontractor on a power plant construction project.[45] Claimant was employed by Bechtel Corporation, the general contractor, but at the time of his injury he had been sent by Bechtel to Babcock & Wilcox and had been working for several weeks under the latter firm's supervision and control.[46] Both firms carried worker's compensation insurance, and claimant settled with his employer, Bechtel, for $35,000.[47]

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[37] *Id.* at 539.

[38] 339 So. 2d 60 (Miss. 1976).

[39] 379 So. 2d at 539.

[40] 384 So. 2d 601 (Miss. 1980).

[41] *Id.* at 603.

[42] *See* MISS. CODE ANN. § 71-3-3(i) (1972) (claimant must show disability in the same or other employment).

[43] 384 So. 2d at 603. In so holding, the court considered Ferguson's efforts to find other employment, as well as his age, education, work experience, and extent of physical impairment. *Id.* at 604.

[44] 388 So. 2d 166 (Miss. 1980). For a thorough analysis of this case, see pages 623-37 *infra*.

[45] *Id.* at 167.

[46] *Id.*

[47] *Id.*

The court, applying Mississippi statutory[48] and case law,[49] held that Babcock & Wilcox was exempt from common law liability.[50] The decision was based on the finding that both Babcock & Wilcox and Bechtel were claimant's employers, and that workmen's compensation benefits are the exclusive remedy against an employer.[51]

Unfortunately, the decision completely ignored Mississippi law concerning the "loaned servant." In *Clark v. Luther McGill, Inc.*,[52] the court stated that a loaned servant does not become an employee without a contract of hire, and that the right to control alone is insufficient to bring the doctrine into play.[53] The rule in *Clark* was followed in subsequent cases that held there must be a clear demonstration that the new temporary employer has been substituted for the old under a contract with the special employer.[54] The outcome could well have been changed under this analysis, and it would have been helpful had the court given some explanation as to why the tests of *Clark* were not used.

F. Procedure—Evidence

In *Segav v. Garan, Inc.*,[55] the court upheld an award of worker's compensation benefits which was based in part on a physician's testimony that it was "entirely possible" that the disability arose as a result of claimant's employment.[56] The court declined to belabor the distinction between probability and possibility as formulated by an expert witness, particularly where there was other evidence supporting the claim.[57]

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[48] MISS. CODE ANN. § 71-3-9 (1972) provides that the liability of an employer under the Workmen's Compensation Act shall be exclusive.

[49] *See* Robertson v. Stroup, 254 Miss. 118, 124-25, 180 So. 2d 617, 620 (1965) (where an employee is engaged by two employers, both are exempt from common law liability even though only one has workmen's compensation insurance).

[50] 388 So. 2d at 168.

[51] *Id.* at 167-68. *See, e.g.,* Biggart v. Texas E. Transmission Corp., 235 So. 2d 443, 445 (Miss. 1970) (worker's compensation benefits are exclusive remedy in dual employment situation); Robertson v. Stroup, 254 Miss. 118, 124-25, 180 So. 2d 617, 620 (1965) (same).

[52] 240 Miss. 509, 127 So. 2d 858 (1961).

[53] *Id.* at 519-20, 127 So. 2d at 862.

[54] *See* Rowell Equip. Co. v. McMullan, 241 Miss. 845, 853, 133 So. 2d 631, 634 (1961) (following rule of *Clark*). Where no employment relationship exists, the Workmen's Compensation Act does not apply to bar a tort action. Index Drilling Co. v. Williams, 242 Miss. 775, 786-88, 137 So. 2d 525, 529 (1962) (immunity of the compensation act is granted only to employers).

[55] 388 So. 2d 164 (Miss. 1980).

[56] *Id.* at 165-66. Employee experienced weakness in her right hand following a minor accident at work. This weakness resulted in a five percent permanent disability of that hand. *Id.*

In another case, *Bennett v. United Parcel Service*,[58] the court upheld the statutory right of the Workmen's Compensation Commission to reopen a case even after the employer's appeal to the circuit court had been dismissed with prejudice.[59] When the Commission's reopened proceeding produced opposite findings,[60] the claimant appealed to the circuit court which remanded certain issues to the Commission. The supreme court reversed this latter action of the circuit court, finding that, at the time of the appeal, there was substantial evidence to support the Commission's findings regarding maximum medical recovery, pre-existing condition, and apportionment of injury.[61] The court allowed the Commission, under section 71-3-7 of the Mississippi Code, to make an early and binding determination that a pre-existing condition contributed to the injury.[62] The court stated, however, that no apportionment could be made until maximum medical recovery was reached.[63]

II. TAXATION

A. *Uniform Statewide Taxation*

In *State Tax Commission v. Fondren*,[64] the court addressed the issue of statewide ad valorem tax equalization. In the wake of an earlier decision of the Mississippi Supreme Court upholding the standing of ad valorem taxpayers to bring suit,[65] the chancery court of the First Judicial District of Hinds County had enjoined the State Tax Commission from approving, effective 1983, the assessment rolls of any county which had assessed property at a value other than its true value, which was defined as "full or one hundred percent value."[66] The chancery court based its decision on article 4, section 112 of the Mississippi Constitution which provides for: (1) equal and uniform taxation throughout the state, (2) taxing in proportion to value, and (3) assessment under general laws and by uniform rules in proportion to value.

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[57] *Id.* at 165. There was undisputed evidence that claimant became aware of her condition while working on the job.

[58] 382 So. 2d 469 (Miss. 1980).

[59] *Id.* at 472.

[60] In the original proceeding it was determined that maximum medical recovery had not been reached, and benefits were awarded based on temporary partial disability. The circuit court dismissed the employer's appeal with prejudice, at which point the employer petitioned the Commission to reopen the cause. The administrative judge found that maximum medical recovery had been reached and that a pre-existing condition was responsible for 80% of claimant's lost wage-earning capacity. The Commission affirmed those findings, and the employee appealed to the circuit court. The circuit court held that the original order was the law of the case, and that it should have governed any further proceedings. Therefore, the court remanded the case for further consideration of the issues of maximum medical recovery and pre-existing condition. *Id.* at 470-71.

[61] *Id.* at 471.

[62] *Id.* at 473 (citing Sanders v. Walker Constr. Co., 251 Miss. 352, 169 So. 803 (1964)).

[63] 382 So. 2d at 473.

[64] 387 So. 2d 712 (Miss. 1980).

The court quoted at length from *Foreman v. Wheatley*,[67] which upheld the constitutionality of the statute that created the Tax Commission and mandated equal taxation among counties.[68] In the instant case, the court alluded to the portions of its earlier decision[69] which held that the Commission was under a duty to enforce section 112, and that differing assessments of parcels of equal value constituted a violation of section 112.[70] The court therefore upheld that part of the chancery court's decree which mandated equality of assessments among counties.[71] However, the court examined both the language of section 112 and the 1980 amendments to the state tax statutes[72] and held that, while property must be appraised at true or full value, it could be assessed at a lesser proportion.[73] To accomplish statewide uniformity of assessments, the court upheld the power and duty of the Tax Commission to set a uniform rule fixing the percentage of true value at which property is to be assessed until such time as the legislature may see fit to set its own uniform rate.[74]

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[65] *See* Fondren v. State Tax Comm'n, 350 So. 2d 1329, 1333 (Miss. 1977) (taxpayer suits may be brought when there is specific authority from the legislature to bring suit, and there is no adequate remedy at law).

[66] 387 So. 2d at 714.

[67] 113 Miss. 555, 74 So. 427 (1917).

[68] Act of April 4, 1916, ch. 98, § 5, 1916 Miss. Laws 95 (codified at MISS. CODE ANN. § 27-35-113 (1972)).

[69] Fondren v. State Tax Comm'n, 350 So. 2d 1329, 1333 (Miss. 1977) (lower court ruling which denied plaintiffs standing to sue reversed).

[70] 387 So. 2d at 719 (quoting Fondren v. State Tax Comm'n, 350 So. 2d 1329, 1334 (Miss. 1977)).

[71] 387 So. 2d at 719-20.

[72] Act of May 16, 1980, ch. 505, §§ 4, 7, 8, 10, 1980 Miss. Laws 1152 (codified at MISS. CODE ANN. §§ 27-35-15, -31, -49, -63 (changing language to "appraise at true value and assess it in proportion thereto").

[73] 387 So. 2d at 721.

[74] *Id.* at 722. The court paid particular attention to Senate Bill 2672, adopted as Act of May 16, 1980, ch. 505, 1980 Miss. Laws 1152, which authorizes assessment of property in proportion to its true value. However, it rejected the idea that the bill's repeal of the

The decision in the instant case is harmonious with the unambiguous mandate of section 112 of the Mississippi Constitution.[75] What is mysterious about this entire subject, however, is that for many years the court had consistently construed section 112 as requiring uniformity only within each taxing district.[76] Even more mysterious is the manner in which the court sidestepped this long line of precedent.[77] The court stated that only by equalizing every county could the overlapping multi-county taxing districts be equalized as well.[78] That analysis, of course, is true, but it begs the question of whether section 112 requires statewide uniformity in the first place. The question is now settled with this decision, but it is somewhat bewildering that prior cases construed section 112 as requiring only intradistrict uniformity. Equally bewildering is the court's about-face on the issue with no explanation.

B. Miscellaneous

The court decided other cases of less import in 1980 that dealt with taxation.[79]

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four-mill ad valorem levy destroyed the idea of uniform statewide taxation. This bill amended MISS. CODE ANN. § 27-35-15 (1972) to read: "The tax assessors shall annually appraise all personal property subject to taxation in their respective counties at true value and assess it in proportion thereto . . . ." Because this bill requires uniform statewide appraisal it might be said that the court's action consisted mainly of requiring uniformity in the percentage of value to be taxed.

[75] MISS. CONST. art. 4, § 112 provides: "Property shall be assessed for taxes under general laws, and by uniform rules and in proportion to its value."

[76] *See* Thompson v. Anding, 370 So. 2d 1335, 1337 (Miss. 1979) (equity court does not have jurisdiction to hear landowner's complaint that separate school district property was assessed at a higher rate than municipal property); Xerox v. City of Jackson, 328 So. 2d 330, 333-34 (Miss. 1976) (application of uniform taxing rate on all copiers in a single taxing district upheld).

[77] *See* 387 So. 2d at 719 (rejecting rule followed in *Thompson v. Anding*). The court said the tax commission's argument "overlooked" the impossibility of achieving uniformity without equalizing on an interdistrict basis. *Id.* The fact is that this obvious truth had been overlooked by prior Mississippi case law, and not the Commission.

[78] *Id.* at 720.

[79] In one case, the court upheld the circuit court's determination, based on expert testimony, that benzene and other substances were petroleum products and therefore exempt from ad valorem taxation under MISS. CODE ANN. § 27-31-19 (1972). City of Pascagoula v. First Chem. Corp., 388 So. 2d 160, 163 (Miss. 1980).

The court also affirmed a chancery court's decision declining to levy taxes on the interest due on a true interest-bearing note under MISS. CODE ANN. § 27-21-5 (1972). Auditor of Public Accounts v. Consumer Credit Plan, 388 So. 2d 150, 152 (Miss. 1980). The court distinguished ABC Finance Corp. v. Auditor of Public Accounts, 339 So. 2d 555 (Miss. 1976) because in that case the finance charge was pre-determined and ap-

III. ELECTIONS

Illegal Votes: Ordering New Elections

In *Pyron v. Joiner,*[80] the court was requested to invalidate a primary election in which up to 3.9% of the votes cast were found to be illegal. The court, however, upheld a Special Tribunal's finding that the result was in conformity with the will of the people and that no uncertainty was cast on the outcome by voiding the illegal votes.[81] The court distinguished *O'Neal v. Simpson,*[82] in which the percentage of illegal votes was 3.8% and changed the result of the election.[83]

The decision in the instant case seems both unfair and contrary to Mississippi precedent. In *O'Neal,* the election was set aside largely be-

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peared in liquidated form on the face of the note.

[80] 381 So. 2d 627 (Miss. 1980).

[81] *Id.* at 630. Pyron filed a petition with the State Democratic Executive Committee to contest its certification of Joiner as the winner, by five votes, in the Democratic primary election for Highway Commissioner for the Southern District. The Committee adhered to its certification, and Pyron filed for judicial review in the Circuit Court of Claiborne County. Pursuant to MISS. CODE ANN. § 23-3-45 (1972), the Chief Justice of the Supreme Court appointed Chancellor John C. Love, Jr. to resolve the dispute. This Special Tribunal reduced by 5,677 the number of votes for Pyron and refused to order a new election. On appeal, Pyron contended that the Special Tribunal erred in not ordering a new election because the number of illegal votes exceeded Joiner's winning margin.

The illegal votes set aside were as follows: improper initialing of ballots, 4,332; failure of managers to count ballots on election day, 258; marking of ballots in lead pencil, 175; discrepancy between number of ballots in box and number of signers on the voting register, 225; tampering with a box after the election, 107. This group of illegal votes constituted 1.9% of the 267,709 total votes cast.

In addition, a group of 5,290 votes was thrown out. These were officially and properly counted, but the Circuit Clerk failed to reseal the ballot boxes properly after the official count was concluded. Pyron confessed a motion to invalidate these ballots, apparently hoping that if the number of illegal votes was increased, a new election would be ordered. Under Allen v. Funchess, 195 Miss. 486, 15 So. 2d 343 (1943), these votes should have been accepted, since the irregularity occurred after the official count. The Special Tribunal did not include these votes in computing the ratio of illegal votes to legal votes. Nevertheless, the supreme court held that even if the additional illegal votes were included, raising the ratio to 3.9%, it would not order a new election. 381 So. 2d at 627-30.

[82] 350 So. 2d 998 (Miss. 1977), *cert. denied,* 435 U.S. 934 (1978).

[83] In *O'Neal,* the general rule was stated as follows:

> If the election was held at the proper time and place, and under the supervision of competent persons, irregularities which concern merely the form of conducting it will not avail; it must be shown that legal votes have been rejected, or illegal votes have been received, and that because of one or the other, or both, the result does not conform to the will of the voters, or uncertainty has been case [*sic*] upon the result.

350 So. 2d at 1009 (quoting Pradat v. Ramsey, 47 Miss. 24 (1872)).

cause the victory margin was twelve and the number of illegal votes was more than seventy.[84] In *Pyron,* the court reasoned that the result was not changed, nor was uncertainty cast on the outcome.[85] But both this rather conclusory allegation and the court's opinion as a whole ignored the basic thrust of Pyron's challenge, that 5,097 votes were declared illegal compared with a victory margin of 1,117.[86] The court seems to place great emphasis on the ratio of illegal votes to the total number cast. It is obvious, however, that the 5,000 illegal votes, although a small percentage of the total, cast doubt as to the true result, given the small margin of victory. In all, the Special Tribunal invalidated more than 10,000 votes before computing the victory margin at 1,117.[87] The court should have applied the more meaningful criterion of the ratio of illegal votes to the victory margin.

In *Blakeney v. Hawkins,*[88] the supreme court let stand a jury verdict in a case in which there was a discrepancy between the tally sheet and number of ballots in a ballot box.[89] The parties stipulated as to the admissibility of all tally sheets and ballots, and no explanation of the discrepancy was made. Thus the court upheld the jury's judgment that the tally sheet, and not the ballots, accurately reflected the number of legal votes cast for each candidate.[90]

IV. ZONING

A. Rezoning Residential Property to Commercial

In *Cloverleaf Mall, Ltd. v. Conerly,*[91] a case seeking rezoning of an area from residential to commercial, the court reiterated that the development of an adjacent commercial area in accordance with a preexisting comprehensive zoning plan does not constitute the material change of conditions necessary to rezone the area.[92] The court also found that there was less than a clear and convincing public need for the rezoning because the necessary expansion of the mall's parking facilities could be made on the existing site, and the county had less than half of its commercially zoned acreage in active use.[93]

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[84] 350 So. 2d at 1009. In *O'Neal,* the court ruled that the 70 voided votes were sufficient to change the result of the election or to cast doubt upon it. Because it could not ascertain the will of the voters, the court ordered a new election. *Id.* at 1012.

In Walker v. Smith, 213 Miss. 255, 56 So. 2d 84, *suggestion of error,* 57 So. 2d 166 (1952), only 6.5% of the total vote was declared illegal. The court ruled that the election was held in substantial compliance with the election statutes. For this reason, the contestant's burden of proof could not be lowered from showing that invalidating his opponent's illegal votes would change the result, to proving that only enough illegal votes were cast to change the result of the election or to cast doubt upon it. *Id.* at 265, 57 So. 2d at 167.

[85] 381 So. 2d at 630.

[86] *Id.* at 628.

[87] *Id.* at 629.

[88] 384 So. 2d 1035 (Miss. 1980).

[89] *Id.* at 1036.

[90] *Id.* at 1036-37. The court ruled that the ultimate question of authenticity was for the jury. It reasoned that since the discrepancy had not been explained, the jury could reasonably conclude that the tally sheet accurately reflected the legal votes received. *Id.*

[91] 387 So. 2d 736 (1980).

B. *Rehearings*

In *Gatlin v. Cook*[94] the court held that the sole remedy available to a protestant of a zoning ordinance was an appeal to the circuit court, and that no authority existed for aggrieved persons to petition the municipal authorities for a rehearing.[95] The court further reasoned that a rehearing was improper because at the time the protestants requested a rehearing, they also filed an appeal, which divested the municipal authorities of jurisdiction.[96] The court left in doubt the power of the municipal authorities to rehear a case which has not been appealed.

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[92] *Id.* at 740. The court noted a presumption that comprehensive zoning plans are intended to be permanent. In order for an area to be rezoned, there must be a change in the neighborhood to justify the rezoning. In the instant case, the court found no such change. *Id.*

[93] *Id.* at 741. The court noted that the official city planner recommended to the mayor and commissioners that the petition be denied, and verified that the proposed rezoning was not necessary to meet the mall's expanded parking needs. The planning commission recommended that the area be rezoned only if petitioners agreed to certain restrictions designed to protect the neighborhood residents. *Id.* at 738. The court ruled that it was unnecessary for it to determine whether this rezoning subject to a stipulation constituted "contract zoning," or whether it was proper, because the petitioners failed to meet the established criteria. *Id.*

[94] 380 So. 2d 236 (Miss. 1980).

[95] *Id.* at 237.

[96] *Id.* The court reasoned that "where a case has been removed to an appellate court by appeal, the lower tribunal is divested of any jurisdiction to subsequently modify its order or entertain a petition for rehearing." *Id.* at 237-38.

The court stated that it found no authority for the rehearing of the zoning action, but the use of the appellate court's reasoning seems to leave the authority to rehear in the absence of an appeal in doubt.

V. EDUCATION

A. Powers of the Board of Trustees of Higher Learning vis-a-vis the State Building Commission

In *State v. Board of Trustees of Institutions of Higher Learning,*[97] the court held that the Board of Trustees could use "self-generated" funds to construct new facilities at the Gulf Coast Research Laboratory without the approval of the State Building Commission.[98] The funds were secured by services performed for third parties by the laboratory, which was under the full control and supervision of the Board of Trustees of Institutions of Higher Learning. The court declined to decide the issue of the Board's autonomy, but did hold that the case was governed by section 213-A of the Constitution[99] in so far as the Board was given management and control of the state institutions of higher learning.[100] The court also upheld the chancellor's findings that the statutes outlining the powers of the Board included "capital outlay expenditures."[101] But the decision was limited to use of self-generated funds, and the court conceded that legislative appropriations for the construction of facilities under the management of the Board would continue to fall under the statutes controlling the Building Commission. The court noted that the Board was a constitutionally created body whose powers could not be infringed upon by the statutorily created Building Commission.[102]

B. Teacher Dismissals

In *Lowndes County Board of Education v. Andrews,*[103] a decision not designated for publication, the Mississippi Supreme Court reversed the chancery court's reopening of a cause in which the chancellor had previously ordered the Lowndes County Board of Education to rehire a teacher whom the Board had dismissed. The chancellor had found that her dismissal was based on hearsay and ordered that she be reinstated for the 1977-78 school year,[104] but refused to award back pay for the year she did not teach. Neither party appealed, and the decree became final. Over one year later the chancellor, over the Board's objection,[105] reopened the cause and awarded the teacher one year's back pay.[106]

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[97] 387 So. 2d 89 (Miss. 1980).

[98] *Id.* at 93. The court defined "self-generated" funds as those secured by the individual institution through its own activities and not by legislative appropriation. *Id.* at 92. In the instant case, the Board received income from the sale of timber and execution of oil leases on land owned by a university. *Id.*

[99] MISS. CONST. art. 8, § 213-A provides in part: "The State institutions of higher learning . . . shall be under the management and control of a Board of Trustees . . . ." *Id.* The failure of the chancellor to base his decree on this section was the basis of the cross-appeal by the Board. The supreme court found merit in this contention: "[W]e hold that [the chancellor] should have gone further and based his decision on section 213-A of the Mississippi Constitution." 387 So. 2d at 93.

[100] 387 So. 2d at 93.

[101] *Id.* at 92. The controlling statute, MISS. CODE ANN. § 37-101-15 (1972), provides in part: "(a) The board of trustees of state institutions of higher learning . . . shall have and exercise control . . . of all funds . . . appropriated for . . . capital outlay expenditures of the institutions of higher learning . . . . "

[102] 387 So. 2d at 93.

[103] No. 51,631 (Miss. Feb. 6, 1980).

The supreme court reversed both the chancery court's ruling that the board could not base termination on hearsay[107] and its award of back pay.[108] The court stated that neither the Public School Fair Dismissal Act of 1974[109] nor the School Employment Procedures Law of 1977 provides tenure for public school teachers.[110] They provide only an opportunity for the teacher to be heard and do not mandate terminations for cause.[111] The court in the instant case found that the procedural requirements had been met.[112]

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[104] Andrews was not rehired for the 1976-77 school year and did not work during that year. In July, 1977, the chancellor ordered her rehired for the 1977-78 school year. *Id.* at 2, 3.

[105] Among the Board's objections was that the former decree was res judicata. *Id.* at 3.

[106] The chancellor reopened and consolidated the former decree and entered a new decree on the basis of the record therein, awarding $11,950 in back pay for the year the teacher was not rehired. *Id.*

[107] *Id.* at 3, 4. The court cited McCormick v. Attala County Bd. of Educ., 407 F. Supp. 586 (N.D. Miss. 1976), in which the district court stated that under Mississippi law a school board had the right to fire a teacher for no reason at all as long as no constitutional rights were violated. No. 51,631 at 6. Obviously, the chancellor's objection to the hearsay evidence lacked merit. Since the board may decide not to rehire for any reason, then all evidence may be considered, whether hearsay or not.

[108] No. 51,631 at 8.

[109] MISS. CODE ANN. §§ 37-9-101 to -113 (Supp. 1980).

[110] No. 51,631 at 4, 8.

[111] MISS. CODE ANN. § 37-9-101 (Supp. 1980) provides in part: "It is the intent of the legislature to establish procedures for providing public school employees with notice of the reasons for not offering an employee a renewal of his contract, to provide an opportunity . . . [to be heard] . . . and not to establish a system of tenure . . . . "

The court interpreted this statute in Calhoun County Bd. of Educ. v. Hamblin, 360 So. 2d 1236 (Miss. 1978), and determined that procedural requirements of timely notice and hearing must be met in order to deny reemployment. *Id.* at 1238-39. The court also determined that the statutes did not create a system of tenure. *Id.* at 1239. *Cf.* Jackson v. Board of Educ., 349 So. 2d 550, 553 (Miss. 1977) (failure to give notice of nonrenewal results in automatic renewal of employment contract).

[112] No. 51,631 at 7.

The court unfortunately did not answer several important questions that were raised in the opinion, such as whether the original decree was res judicata with respect to the later action, and whether the portion of the original decree ordering the teacher's reemployment stood.[113]

VI. GOVERNMENT CONTRACTS AND EXPENDITURES: STATE AND LOCAL

A. *Purchasing School Buses*

In *State Board of Education v. Bus Supply Co.,*[114] a case construing section 37-41-101 of the Mississippi Code, the court held that the statute, as amended, provided that only those contractors whose bids were accepted by the State Board of Education were authorized to sell transportation equipment within the state.[115] The court rejected the contention that counties could purchase from whomever they chose, as long as the price did not exceed that accepted by the school board. The court further determined that the language of the statute mandated that the Board itself make the contract and that the counties were required to make their purchases under that contract. The court stated that it would be an exercise in futility to have the Board accept the lowest and best bid, only to have the county sell to an entirely different bidder, even if the price was no greater than the Board's accepted bid.[116] The court concluded that a different interpretation would greatly weaken the incentive for any company to submit a low bid if it knew that it could sell whether or not that bid was accepted.[117]

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[113] The court stated, "While there is grave doubt that the action of the chancellor in reopening a case in which a final decree had been entered . . . was proper it is unnecessary to decide that question. If it was proper to reopen, the record shows that it was error to have entered an order directing reemployment . . . ." *Id.* at 7. The court stated in conclusion, "The decree appealed from will be reversed. . . ." *Id.* at 8. It is less than clear whether this meant both the original order directing reemployment and the back pay award, or merely the latter.

[114] 386 So. 2d 383 (Miss. 1980).

[115] *Id.* at 386. MISS. CODE ANN. § 37-41-101 (Supp. 1980) (amending MISS. CODE ANN. § 37-41-101 (1972)) provides:

> The state board of education is hereby authorized, empowered and directed to advertise for and receive sealed bids and proposals for sale of school transportation equipment and supplies to the counties and school districts of this state, and to enter into contracts relative thereto based upon the lowest and best bids, which counties or school districts may not exceed in purchasing such school transportation equipment and supplies. In determining the lowest and best bids received for such equipment and supplies, there shall be included as part of the total cost thereof any transportation or freight charges which will be incurred. County boards of education and the trustees of school districts may make purchases under such bids and according to the provisions of this section without additional advertisement for bids.

B. *Nepotism: Boards of Supervisors*

In *State ex rel. Summer v. Denton,*[118] a case in which a county contract was awarded to a supervisor's relative within the third degree of kinship, the court held that the members of the board were not personally liable where the county suffered no actual loss, but that they were liable, along with their sureties, for penal damages under the nepotism statute.[119] The court rejected the defense of reliance on an attorney general's opinion because the opinion had only covered one related bidder and not additional persons who were ultimately paid by the county.[120] The defense was also rejected because the court refused to allow reliance on an oral opinion.[121]

C. *Sixteenth Section Lands: Municipal Separate School Districts*

In *Womack v. Nobles,*[122] the court affirmed a decree adjudicating as void a lease of sixteenth section land that was executed without the approval of the municipal separate school district in which the land was located. The land covered by the lease had been a part of the Forrest County School District until two months prior to the application for the lease; at that time it became part of the newly created Petal Municipal School District.[123] The Womacks, however, made their application to the Forrest County Board of Supervisors, and it was approved by that body, the County Superintendent of Education, and the Board of Trustees of the Forrest County School District. No approval was ever granted by the Petal Municipal School District.[124] The court rejected any assertion that the lease was merely voidable, and stated that, absent compliance with the statute,[125] the lease was invalid.[126]

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[116] 386 So. 2d at 386-87.

[117] *Id.*

[118] 382 So. 2d 461 (Miss. 1980).

[119] *Id.* at 465-66. Suit was brought by the auditor of public accounts and the attorney general for the use and benefit of Alcorn County to recover funds expended and to assess penal damages. The father of the family hauling gravel for the county submitted the bid, but his two sons were paid individually for the effort, and one of them was a nephew by marriage to a member of the board of supervisors. The supervisors were aware of the relationship. *Id.* at 462-63. MISS. CODE ANN. § 19-13-3 (1972 & Supp. 1980) makes it unlawful for a supervisor knowingly to vote in favor of such a contract, but because the appropriations were for objects authorized by law, no personal liability could be found under MISS. CODE ANN. § 19-13-37 (1972 & Supp. 1980). 382 So. 2d at 465. *See* Entrican v. King, 289 So. 2d 913, 917-18 (Miss. 1974) (no personal liability where county suffers no loss and where expenditures devoted to objects authorized by law). Under MISS. CODE ANN. § 19-13-37(2) (Supp. 1980), however, the supervisors were held liable on their official bonds for departing from lawful methods of making contracts. 382 So. 2d at 466. Under this part of the statute, no actual loss need be demonstrated. *Id.* at 465.

[120] 382 So. 2d at 467-68. The attorney general's office had responded only to the question of whether the father and the supervisor, who had married sisters, were brothers-in-law, and had found that they were not. The court reversed that finding. *Id.* at 468. The decision regarding this defense seems extremely rigid.

[121] *Id.* at 468.

[122] 382 So. 2d 1081 (Miss. 1980).

D. Drainage Districts

In *Leflore County v. Big Sand Drainage District,*[127] the court held that a county does not have to reimburse a drainage district for expenditures incurred by that district in constructing bridges and culverts.[128] The statutes that govern the drainage districts[129] do not give them the authority to construct bridges and culverts; that authority instead is vested by statute in the board of supervisors.[130] The liability of a county to pay any sum of money, whether in tort or contract, must be expressly authorized by, or necessarily implied from, some statute.[131]

VII. Civil Service

Dismissals

In *Eidt v. City of Natchez,*[132] the court found that the dismissal of a Natchez fireman violated section 21-31-23 of the Mississippi Code[133] which requires that discharges shall be made "upon the written accusation of the appointing power."[134] That power, in this instance, rested in the mayor and the board of alderman, and not in the fire department chief who actually signed the discharge.[135] The court refused to find an assumed or implied confirmation of the discharge by the appointing power because to have done so would have contravened the essence of civil service protection.[136]

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[123] *Id.* at 1082.

[124] *Id.*

[125] This statute provides that no action taken concerning school lands by the county boards of supervisors shall be valid unless approved by a majority of the board of trustees for the school district in which the land is located. Miss. Code Ann. § 29-3-1 (1972 & Supp. 1980).

[126] 382 So. 2d at 1082-84.

[127] 383 So. 2d 501 (Miss. 1980).

[128] *Id.* at 503.

[129] Miss. Code Ann. § 51-29-95 (1972) (ditches may cross highways and roads); *id.* § 51-31-95 (drains may cross public roads).

[130] Miss. Code Ann. § 51-31-95 (1972) (board of supervisors shall have duty of removing and constructing all bridges necessary to be removed or constructed).

[131] 383 So. 2d at 503 (citing Board of Supervisors v. Payne, 175 Miss. 12, 166 So. 232 (1936)).

[132] 382 So. 2d 1093 (Miss. 1980).

VIII. HEALTH

Appointments to the State Board of Health

In *Clark v. State Medical Association,*[137] the state and the State Medical Association, alleging non-compliance with the statute requiring nomination by the Medical Association and confirmation by the Senate, challenged in the Circuit Court of Hinds County the authority of three doctors to serve on the State Board of Health.[138] The circuit court stayed its action pending the outcome of a suit filed by the doctors in federal court.[139] The federal district court dismissed the complaint and the Fifth Circuit reversed in part, affirmed in part, and retained jurisdiction pending a decision by the circuit court on the constitutionality, under state law, of the appointment statute.[140] The Circuit Court of Hinds County heard all of the issues pertaining to the original cause and, finding the statute constitutional, ordered the doctors removed from the board.[141] The Fifth Circuit, also finding the statute constitutional, dismissed the action.[142] The Mississippi Supreme Court then heard this appeal from the circuit court's decision, and adopted the lower court's opinion.[143] The court also cited the Fifth Circuit's opinion upholding the statute.[144] The circuit court did not find the statute vague in its reference to what constitutes the State Medical Association.[145] Neither did it find objectionable under state law the Governor's lack of power to make these appointments nor the delegation of nominating power to the Medical Association.[146]

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[133] MISS. CODE ANN. § 21-31-23 (1972).

[134] 382 So. 2d at 1095. Eidt allegedly hit another fireman and was suspended without pay. Eidt's appeal to the Commission was rejected. Subsequently, the chief sent Eidt a termination notice stating as its grounds "incompetence, discourtesy, and injury to public service." *Id.* at 1094. The Commission affirmed the discharge after a full evidentiary hearing. The circuit court affirmed the Commission's decision. *Id.*

[135] *Id.* at 1095.

[136] *Id.* The decision was not based on the constitutionality of the pretermination procedures. *Id.*

[137] 381 So. 2d 1046 (Miss. 1980).

[138] *Id.* at 1047. MISS. CODE ANN. § 41-3-1 (1972) requires that the State Medical Association nominate three physicians "from each congressional district in the state, from which number the governor shall appoint one from each congressional district. Said appointments are to be confirmed by the senate." *Id.*

[139] 381 So. 2d at 1047-48. The doctors' suit was filed against the Mississippi State Medical Association in the federal court for the Southern District of Mississippi. *Id.*

[140] *Id.* at 1048. Since the constitutionality of MISS. CODE ANN. § 41-3-1 (1972) had not been addressed by the Mississippi judiciary, and because there was a suit pending in a Mississippi circuit court, the Fifth Circuit ordered the plaintiff doctors to present the constitutional question to the state court. Finch v. Mississippi State Medical Ass'n, 585 F.2d 765, 776-78 (5th Cir. 1978).

IX. MARINE CONSERVATION

Ordinance Permitting Only Live Bait Shrimping

In *Mississippi Gulf Coast Fisherman's Organization, Inc. v. Mississippi Marine Conservation Commission,*[147] the court affirmed a chancellor's upholding of an ordinance passed by the Marine Conservation Commission that allowed only live bait fishermen to take shrimp in a certain area along the Gulf Coast.[148] The court declined to accept the interpretations of the live bait statutes of the challenging commercial fishermen[149] and relied instead on the plenary authority granted to the Commission to fashion each regulation as it deemed proper.[150] The court accepted the lower court's determination that the Commission had not abused its discretion by passing the ordinance.[151] Neither did the court find any merit in equal protection arguments, because the purpose of the statute was conservation and not the favoring of any particular group.[152]

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[141] 381 So. 2d at 1048.

[142] Finch v. Mississippi State Medical Ass'n, 594 F.2d 163, 166 (5th Cir. 1979). The Fifth Circuit presumed the statute was constitutional because it did not draw on inherently suspect classifications or trammel fundamental rights. Rather, it found that the statute was rationally related to the legitimate purpose of securing professionally qualified people to serve on the Board. *Id. See* Friedman v. Rogers, 440 U.S. 1, 15-16 (1979) (state statute requiring two-thirds of members of state optometry board to be members of state optometric association was constitutional).

[143] 381 So. 2d at 1048.

[144] *Id.* at 1051-52.

[145] *Id.* at 1049. The court stated that it was not at all uncertain whether the doctors might be considered members of the State Medical Association. *Id.*

[146] The circuit judge noted that neither MISS. CONST. art. 5, § 116 nor § 123 expressly confers broad appointive powers, and that § 103 empowers the legislature to determine the mode of filling vacancies in offices. Further, MISS. CODE ANN. § 7-1-35 (1972) states that all gubernatorial appointments shall be with the advice and consent of the Senate. 381 So. 2d at 1049-50. *See* 38 AM. JUR. 2d *Governor* § 5 at 935 (1968) (appointment power does not necessarily inhere in the governor, but must be derived by constitution and statute).

On the issue of the delegation of appointment power to the Medical Association, the court followed State v. Land, 231 Miss. 529, 95 So. 2d 724 (1957), finding that the statute reasonably defined the area in which the Medical Association was to operate. *See* 67 C.J.S. *Officers* § 36 at 300-01 (1978) (must be substantial and rational relation between the nongovernmental body entrusted with the appointment and the function of government which the appointed officials are to perform).

[147] 387 So. 2d 757 (Miss. 1980).

X. PRIVATE ORGANIZATIONS

Discipline of Members

In *Multiple Listing Service of Jackson, Inc. v. Century 21 Cantrell Real Estate, Inc.*,[153] the Mississippi Supreme Court modified a chancery court's injunction and allowed the enforcement of a realtors association's sanctions against one of its members.[154] The sanctions allowed by the court were a six month probation and a thirty day suspension of membership.[155] The court did uphold the injunction against a $300 fine levied by the association, because the association lacked a maximum schedule of fines.[156] The court stated that the lack of a maximum schedule invited arbitrary action.[157] Further, to allow a fine of potentially unlimited amount to be set after an offense occurred would violate the fourteenth amendment to the United States Constitution.[158]

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[148] *Id.* at 760-61. Ordinance 0-86 passed by the Mississippi Marine Conservation Commission had the practical effect of allowing only live bait fishermen to enter a certain area of water and take shrimp. *Id.* at 758.

[149] *Id.* at 759. The challengers asserted that the Commission could only license live bait catchers to take shrimp in areas where others could do so, although live bait catchers could take them in either the open or closed season. *Id.* MISS. CODE ANN. § 49-15-29(i) (Supp. 1980) provides that live bait catchers must purchase a license and that "such shrimp may be taken in either the closed or open season." *Id.*

[150] The court relied on MISS. CODE ANN. § 49-15-1 (1972) as expressing the legislature's intent to vest full and ample authority in the specialized commission to conserve seafood life. Under MISS. CODE ANN. § 49-15-11(1) (Supp. 1980), the Marine Conservation Commission is given plenary power pertaining to all saltwater aquatic life. 387 So. 2d at 759.

[151] 387 So. 2d at 760.

[152] The court found no unlawful discrimination because any fisherman has the opportunity to become a live bait shrimper. *Id.* at 761.

[153] 390 So. 2d 982 (Miss. 1980).

[154] *Id.* at 986. The real estate associations involved in this suit are non-profit professional organizations, membership in which is voluntary. *Id.* at 983. The injunction issued by the chancery court enjoined three separate sanctions involving two unrelated complaints filed against the member. *Id.*

[155] The injunction against the probationary period was struck because the member did not pursue the administrative remedies provided by the constitution and bylaws of the association. The court followed dictum in NCAA v. Gillard, 352 So. 2d 1072 (Miss. 1972), in reaching that conclusion. The 30 day suspension was upheld because the member was afforded every element of due process. 390 So. 2d at 983-84. The court stated

XI. Attorney Misconduct

A. *Tort Suit Following Unsuccessful Complaint to State Bar Association*

In *White v. McRae,*[159] the court rejected the notion that either res judicata, collateral estoppel by judgment, or election of remedies applied to bar a plaintiff from bringing a tort action against an attorney in circuit court after an unsuccessful complaint to the Mississippi State Bar.[160] The court stated that the statutory purpose of the State Bar tribunal was disciplinary, and that the outcome of the complaint in no way affected a subsequent suit for money damages.[161]

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that judicial review of disciplinary proceedings in a voluntary association is limited to determining whether the member received procedural due process and whether the inquiry was conducted in accordance with the organization's own rules. *Id.* at 984. An earlier Mississippi case, Lowery v. International Bhd. of Boilermakers, 241 Miss. 458, 130 So. 2d 831 (1961), had announced a somewhat different rule. In *Lowery,* it was stated that courts will not intervene except where fraud has been perpetrated upon the member. The holding in the instant case obviously adopts a stricter standard for private associations by incorporating due process guarantees.

[156] 390 So. 2d at 985-86.

[157] *Id.*

[158] In reaching this result, which is in reality a finding that a lack of a maximum fine schedule is inherently unfair, the court cited only one case, American Men's and Boy's Clothing Mfg. Ass'n v. Proser, 190 A.D. 164, 179 N.Y. S. 207 (App. Div. 1919). The court cited no case for the proposition that the lack of a schedule would violate the equal protection clause of the fourteenth amendment. In fact it seems more likely that a due process rather than an equal protection right is involved, since the member made no claim that she was treated differently than anyone else. *See* McCreery Angus Farms v. American Angus Ass'n, 379 F. Supp. 1008, 1019 (S.D. Ill. 1974) (association must adhere to principles of fairness and due process).

[159] 380 So. 2d 1390 (Miss. 1980).

[160] *Id.* at 1391. The attorney had permitted the statute of limitations to run on a worker's compensation claim entrusted to him. *Id.* at 1390.

[161] *Id.* at 1391. "[The Mississippi State Bar] is a quasi-judicial forum at most, powerless to offer jury trials or money judgments. It follows that White's Mississippi State Bar complaint, regardless of its disposition, had no effect whatsoever upon his right later to pursue a private remedy in the circuit court." *Id.* An interesting, but unanswered, question is whether the complaint's disposition at the State Bar proceeding would be admissible evidence in the tort suit.

B. Disbarment

In *Mississippi State Bar v. Phillips,*[162] the supreme court held that section 73-3-329 of the Mississippi Code[163] did not prevent the court from exercising its inherent power to order the disbarment of an attorney convicted of any felony other than manslaughter or a violation of the United States Internal Revenue Code. Upon Phillips' conviction of a felony, a Complaint Tribunal of the Bar was organized, and he was subsequently suspended from the practice of law for three years and six months.[164] The Bar appealed, contending that conviction mandated not suspension, but disbarment.[165] The Mississippi Supreme Court agreed, and held that it was not foreclosed by the ruling of the Complaint Tribunal from ordering disbarment. On application to modify its opinion,[166] the court ruled that for purposes of petition for reinstatement the three year period ran from the date of the Complaint Tribunal ruling.[167]

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[162] 385 So. 2d 943 (Miss. 1980).

[163] MISS. CODE ANN. § 73-3-329 (Supp. 1980) provides for an appeal from the judgment of the complaint tribunal.

[164] 385 So. 2d at 943.

[165] *Id.* at 944.

[166] Phillips filed a petition for rehearing. He did not challenge the opinion of the court, but only requested that the court specify a date from which the three year period would run. The court treated this as a petition for modification. *Id.* at 950.

[167] *Id.* at 951. The court construed MISS. CODE ANN. § 73-3-337 (Supp. 1980) which provides: "Any time after the expiration of three (3) years from and after the date of the final judgment of disbarment, the convicted attorney may petition the court for reinstatement."

CIVIL PROCEDURE

During the 1980 term, the Mississippi Supreme Court decided thirty-two cases which affect various areas of civil procedure. Several decisions involving additur and remittitur,[1] damages,[2] directed verdicts and peremptory instructions,[3] injunctions,[4] jury selection,[5] res judicata,[6] and notice[7] do not warrant textual treatment.[8] The cases dealing with the following five aspects of civil procedure, however, are noteworthy.

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[1] Shaw v. Richardson, 392 So. 2d 213, 216 (Miss. 1980) (refusal to enter remittitur is not reversible unless it is a product of manifest abuse of judicial discretion); Collins v. Black, 380 So. 2d 241, 244 (Miss. 1980) (ability to pay punitive damages may be considered by the jury, but it is not the only consideration).

[2] Cox v. State Highway Comm'n, 386 So. 2d 1107, 1109 (Miss. 1980) (where second trial results in reduced judgment, judgment debtor is entitled to excess paid into registry of the court after first trial); Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 71 (Miss. 1980) (physical damage required to recover for mental suffering); Mallette v. Hurt, 383 So. 2d 503, 506 (Miss. 1980) (damages allowed for intentional acts in negligence action); Tucker v. Kelly, 381 So. 2d 1030, 1032 (Miss. 1980) (new trial on issue of damages granted for failure to allow for personal injury).

[3] Jackson v. Griffin, 390 So. 2d 287, 289 (Miss. 1980) (negligence case requires jury determination); Berryhill v. Byrd, 384 So. 2d 1026, 1028 (Miss. 1980) (trial court does not lose jurisdiction over motion for new trial when vacation passes with no action being taken); Huffman v. Houston Dairy, Inc., 381 So. 2d 1036, 1037 (Miss. 1980) (error to grant directed verdict where sufficient case for submission to jury is made); Neshoba County Gin Ass'n v. Blackwell Chevrolet Co., 381 So. 2d 168, 169 (Miss. 1980) (same); Pollan v. Illinois Cent. Gulf R.R., 378 So. 2d 659, 661 (Miss. 1980) (requirements not met for peremptory instruction).

[4] Monaghan v. Blue Bell, Inc., 389 So. 2d 1383, 1384 (Miss. 1980) (appeal of one-year injunction mooted when raised after the injunction period had passed); Invesat Corp. v. Harrison Enterprises, Inc., 386 So. 2d 721, 721-22 (Miss. 1980) (failure to post bond voids preliminary injunction).

[5] Marshall Durbin, Inc. v. Tew, 381 So. 2d 152, 154 (Miss. 1980) (juror prejudiced by failure to disclose recent dealings with plaintiff's counsel).

[6] Ditta v. City of Clinton, 391 So. 2d 627, 629 (Miss. 1980) (where parties and cause of action are not the same, res judicata is not applicable; collateral estoppel applicable only when essential element of fact was fully litigated in previous suit); White v. McRae, 380 So. 2d 1390, 1391 (Miss. 1980) (pursuit of state bar disciplinary action does not prevent court action).

[7] Richmond v. Lamb, 390 So. 2d 1003, 1005 (Miss. 1980) (transmission of certified copy of final decree by certified mail was sufficient to satisfy service of notice requirement, since no method of service was specified in MISS. CODE ANN. § 11-5-89 (1972)).

[8] None of the omitted cases substantively affects the civil procedure area or includes a dissenting opinion.

I. APPEAL AND ERROR

Seven cases involving appellate procedure were decided in 1980.[9] Of these decisions, *Dixieland Food Stores, Inc. v. Kelly's Big Star*[10] is of particular interest in that the Mississippi Supreme Court again was called upon to define the steps for perfecting an appeal under the recently amended statutes governing appellate procedure.[11]

In *Dixieland Food Stores,* a judgment was rendered against the appellants on May 5, 1979.[12] On July 12, 1979, the appellants filed their petition for appeal and an appeal bond with supersedeas. The Circuit Clerk of Smith County approved the bond and granted the petition for appeal as authorized by section 11-51-51 of the Mississippi Code.[13] The appellee contended in its motion to dismiss the appeal that the appellants were required by section 25-7-3[14] to pay the filing fee and prepay costs of the lower court within the required forty-five days from final judgment.[15] After the 1978 legislative changes in appellate procedure became effective,[16] an appeal from a final judgment could be taken by following one of three statutory procedures:[17] (1) by prepaying the costs in the lower court and the filing fee, (2) by filing a transcript of the record of the case in which the appeal is taken with the office of the Clerk of the Mississippi Supreme Court,[18] and (3) by petition for appeal.[19] Under each method, the appeal must be taken within forty-five days after rendition of the final judgment.[20]

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[9] The following cases dealing with appeal and error are not discussed in the text: Altamil Corp. v. Mississippi State Highway Comm'n, 391 So. 2d 1013, 1015 (Miss. 1980) (en banc) (where commission failed to post bond, cross-appeal not permitted); Grisham v. Britfield, 391 So. 2d 107, 108 (Miss. 1980) (appeal of filiation order from county court should be taken directly to the Mississippi Supreme Court pursuant to MISS. CODE ANN. § 93-4-41 (1972)); Woods v. Lee, 390 So. 2d 1010, 1011-12 (Miss. 1980) (where judge kept motions for judgment notwithstanding the verdict and a new trial under advisement for more than one year, the motions remained interlocutory, and the proper remedy was a request for writ of mandamus); Warren v. Smith-Vaniz, 382 So. 2d 1088, 1090 (Miss. 1980) (failure to file declaration within 30 days after transfer from chancery court to circuit court supported dismissal); Pinson v. Maywebb, 380 So. 2d 244, 245 (Miss. 1980) (motion to relax costs denied where no certificate of correctness was filed); Reed Constr. Co. v. Nicholas Acoustics & Specialty Co., 379 So. 2d 308, 312-13 (Miss. 1980) (master's findings similar to jury verdict).

[10] 384 So. 2d 1031 (Miss. 1980).

[11] MISS. CODE ANN. §§ 11-1-21; 11-3-5, -23, -33, -41 to -45; 11-27-29, -37; 11-51-7, -11, -15, -21, -25 to -39, -45, -47, -51, -53, -61, -69 to -73, -99, -105 to -109; 13-3-121; 25-7-3; 99-35-105 to -109, -121 (Supp. 1980). *See generally* Allen & Taylor, *Appeals to the Mississippi Supreme Court,* 48 MISS. L.J. 505, 536-40 (1977) (discussing statutory methods of appeal).

[12] 384 So. 2d at 1032.

[13] *Id.* MISS. CODE ANN. § 11-51-51 (Supp. 1980) provides:

> In all cases, except appeals from decrees overruling demurrers in chancery and appeals from interlocutory decrees in chancery, appeals to the supreme court may be granted by the clerk of the court from which such appeals can be taken, and in which the judgment or decree was rendered. In all cases not otherwise provided, the clerk shall approve the supersedeas bond.

[14] 384 So. 2d at 1032. MISS. CODE ANN. § 25-7-3 (Supp. 1980) directs the lower court to collect a $50 filing fee on behalf of the clerk of the supreme court.

[15] 384 So. 2d at 1032. MISS. CODE ANN. § 11-51-5 (Supp. 1980) provides in pertinent

The issue presented by *Dixieland Food Stores* was whether the appellant was required by the language in section 11-51-15[21] to pay the filing fee and court costs within the forty-five day period to perfect properly an appeal which is taken by petition.[22] One year earlier, the

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part that "appeals to the Supreme Court shall be taken within forty-five days next after the rendition of the judgment." In *Dixieland Food Stores* the circuit court did not file a certificate of estimated costs until September 13, 1979. The balance of the bill was paid on September 18, 1979, and the record was filed in the supreme court on October 30, 1979. 384 So. 2d at 1032.

[16] Act of March 7, 1978, ch. 335, 1978 Miss. Laws 458 (codified at MISS. CODE ANN. §§ 11-1-21; 11-3-5, -23, -33, -41 to -45; 11-27-29, -37; 11-51-7, -11, -15, -21, -25 to -39, -45, -47, -51, -53, -61, -69 to -73, -99, -105 to -109; 13-3-121; 25-7-3; 99-35-105 to -109, -121 (Supp. 1980)).

[17] 384 So. 2d at 1032. For a discussion of the requirement of timely compliance with statutory procedures, see F. JAMES & G. HAZARD, CIVIL PROCEDURE § 13.7, at 676 (2d ed. 1977).

[18] MISS. CODE ANN. § 11-51-25 (Supp. 1980) provides:

> A written petition for an appeal shall not be necessary to its validity, but filing in the office of the clerk of the supreme court a transcript of the record of the case in which the appeal is taken shall confer jurisdiction on the supreme court to try and dispose of the case. Where there is no petition for the appeal, it shall be considered to have been taken when the costs in the lower court and the fee required by section 25-7-3 were paid to the clerk of the lower court or from the time of filing the transcript of record in the office of the clerk of the supreme court.

[19] *Id.* §§ 11-51-15, -51.

[20] *Id.* § 11-51-5. An exception is made for infants and persons of unsound mind. In cases where a guardian ad litem has been appointed, however, the appeal must be made within two years of the judgment. *Id.*

[21] The section provides: "The time of presenting such petition for an appeal shall be considered the time of taking the appeal, if costs be then paid as required." *Id.* § 11-51-15.

Not only does the language of the amendment seem to call for prepayment of costs to perfect an appeal under this section, but the stated purpose of the amendment is "to provide that the prepayment of lower court costs and a fee . . . be required for perfecting an appeal to the Supreme Court . . . . " Act of March 7, 1978, ch. 335, 1978 Miss. Laws 456 (uncodified preamble).

[22] 384 So. 2d at 1034. MISS. CODE ANN. § 11-51-29 (Supp. 1980) requires the prepayment of costs to the clerk of the trial court but does not specify the time for prepayment.

Mississippi Supreme Court had held in *Allgood v. Allgood*[23] that an appeal under section 11-51-25 of the Mississippi Code is perfected when the costs are prepaid rather than when the transcript is filed with the supreme court,[24] and that if the clerk of the trial court failed in his duty to present the bill of costs,[25] the appellant would be required to make a written motion to compel production of the bill.[26] In *Dixieland Food Stores,* however, the court held that an appeal under sections 11-51-15 and 11-51-51 is taken when the petition is filed, and this is not dependent upon prepayment of costs.[27]

The decision in *Dixieland Food Stores* merely requires that costs be paid before the record is filed with the Mississippi Supreme Court.[28] The decision was based primarily upon what the court recognized as a lack of legislative intent to impose this additional requirement when an appeal is taken by petition.[29] The court also pointed out that section 11-3-5[30] provides that the court shall not dismiss an appeal where an officer has failed in his duty to prepare appeal costs.[31] While delays may occur in compiling the cost bill in an appeal despite the clerk's statutory duty,[32] according to *Dixieland Food Stores,* unless there exists some specific legislative intent to the contrary, the appellant should not be penalized by such delays.[33]

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[23] 367 So. 2d 450 (Miss. 1979) (en banc), *construed in 1979 Mississippi Supreme Court Review,* 50 MISS. L.J. 699, 730-32 (1979).

[24] 367 So. 2d at 451.

[25] *Id.* at 452. MISS. CODE ANN. § 11-51-61 (Supp. 1980) provides in pertinent part: "The clerk of the trial court shall, within five (5) days of the rendering of a final judgment or a final decree, compile, certify and record in the official file of the case a complete cost bill . . . . "

[26] 367 So. 2d at 452. Under the previous statute, MISS. CODE ANN. § 11-51-61 (1972) (amended 1978), if the clerk failed to fulfill his duty, the appellant had to apply to the supreme court for a writ of certiorari. *See, e.g.,* Aluminum Cooking Utensil Co. v. Shivers, 149 Miss. 197, 197, 115 So. 345, 345 (1928) (parts of record omitted); Walden v. State, 127 Miss. 486, 487-88, 90 So. 177, 177 (1922) (negligent failure by clerk to send up record). *But see* Lee v. Spikes, 145 Miss. 895, 896, 111 So. 450, 450 (1927) (transcript will not be stricken for clerk's failure to sign certificate of record, but certiorari will issue directing him to send proper record).

[27] 384 So. 2d at 1034.

[28] *Id.*

[29] The court pointed to the language of § 11-51-7 as an example of a specific legislative intent to require prepayment of costs on appeal. 384 So. 2d at 1034. MISS. CODE ANN. § 11-51-7 (Supp. 1980) provides that appeals from interlocutory decrees "must be applied for and costs paid within thirty (30) days after the order or decree appealed from is filed . . . ."

[30] MISS. CODE ANN. § 11-3-5 (Supp. 1980).

[31] 384 So. 2d at 1034. Although the statute may be used to cure various procedural defects, it may not be used to confer jurisdiction upon the court when the attempted perfection is taken after the time allowed by statute. *See, e.g.,* Kennedy v. Gervais, 345 So. 2d 1039, 1039 (Miss. 1977) (appeal bond not filed within statutory period); Fisher v. Crowe, 289 So. 2d 921, 924 (Miss. 1974) (same). *But see* Clow Corp. v. J.D. Mullican, Inc., 336 So. 2d 1327, 1328 (Miss. 1976) (appellant granted leave to amend bond after expiration of 45 day period when bond filed within statutory period); First Nat'l Bank v.

II. Eminent Domain

The only case decided this year which affects eminent domain procedure was *Barrett v. State Highway Commission.*[34] In *Barrett,* the appellants contended that the trial court, by suppressing various discovery devices, had committed reversible error.[35] Thus, the Mississippi Supreme Court was faced with the issue whether the provisions of the

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Cutrer, 190 So. 2d 883, 885 (Miss. 1966) (technical defect not fatal where bond filed within statutory period); Snipes v. Commercial & Indus. Bank, 225 Miss. 345, 360, 82 So. 2d 895, 896 (1955) (same).

[32] 384 So. 2d at 1034. Many jurisdictions recognize that appellate jurisdiction should not be defeated where the appellant or his counsel has relied on a public officer to fulfill his duty. *See, e.g.,* Davis v. Patrick, 122 U.S. 138, 139 (1887) (judge's failure to sign bill of exception); Peterson v. Idaho First Nat'l Bank, 83 Idaho 578, 580, 367 P.2d 284, 286 (1961) (clerk's delay in preparation of transcript); Cook v. AAA Worldwide Travel Agency, 342 So. 2d 713, 714 (La. Ct. App. 1977) (same). Jurisdiction is rarely upheld, however, when the failure to meet the statutory requirement is caused by the appellant. *See, e.g.,* Dimun Inv., Inc. v. Citizens Fed. Sav. & Loan Ass'n, 249 So. 2d 63, 63 (Dist. Ct. App. Fla. 1970) (failure to direct court clerk to prepare records); Futch v. Greene, 252 So. 2d 744, 744 (La. Ct. App. 1971) (failure to pay court costs caused failure to lodge record on appeal); Harris v. Sykes, 207 So. 2d 344, 345 (Miss. 1968) (delay in filing record with appellate court after perfection of appeal).

[33] 384 So. 2d at 1034.

[34] 385 So. 2d 627 (Miss. 1980).

[35] *Id.* at 628. In Mississippi, the trial court has broad power to control and limit discovery. The ultimate question on review then is whether the trial court abused its discretion. *See* Clark v. Mississippi Power Co., 372 So. 2d 1077, 1080 (Miss. 1979) (trial court has wide discretion in matters related to discovery as long as that discretion is not abused); Harkins v. Puschall, 348 So. 2d 1019, 1022 (Miss. 1977) (same). This standard is consistent with supreme court rule 11 which states:

> No judgment shall be reversed on the ground of misdirection to the jury, or the improper admission or exclusion of evidence, or for error as to the matter of pleading or procedure, unless it shall affirmatively appear, from the whole record, that such judgment has resulted in a miscarriage of justice.

Miss. Sup. Ct. R. 11.

Mississippi's standard of review is consistent with that of other jurisdictions. *See, e.g., Ex parte* Guerdon Indus., Inc., 373 So. 2d 322, 324 (Ala. 1979) (trial court did not abuse its discretion by issuing a protective order barring access to records of a juvenile proceeding); Folds v. Red Arrow Towbar Sales Co., 378 So. 2d 1054, 1057 (La. 1979) (regulation of pretrial discovery is subject to broad discretion of the trial court and its rulings will not be disturbed on appeal absent a clear showing of abuse).

Mississippi Code pertaining to discovery in civil proceedings[36] apply to the special courts of eminent domain. Observing that the powers and jurisdiction of the courts of eminent domain are derived from section 11-27-3 of the Mississippi Code[37] which states the jurisdiction of the county and circuit courts, the court reasoned that the discovery statutes should apply in the courts of eminent domain just as in civil proceedings in other courts within the state.[38]

Generally, the statutory procedures which govern eminent domain cases[39] have been strictly construed and closely scrutinized for the protection of the due process rights of landowners.[40] Where the statutes relating to eminent domain are incomplete, however, reference to other statutes relating to civil procedure is not uncommon.[41] Rules of civil procedure have been applied to condemnation proceedings at least to the extent that they are not inconsistent or in conflict with the eminent domain statutes.[42] The extension of the discovery statutes to eminent domain proceedings thus seems justified because it further ensures that the landowner will be protected as much as possible under procedures designed to allow deprivation of property against the owner's wishes. The time and expense involved in discovery, however, may prove costly to the condemnor who seeks an expedient condemnation proceeding.

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[36] MISS. CODE ANN. §§ 13-1-201, -226 to -237, -241, -243 (Supp. 1980).

[37] MISS. CODE ANN. § 11-27-3 (Supp. 1980) vests the powers and jurisdiction of the court of eminent domain in the county courts or, where there is no county court, in the circuit court.

[38] 385 So. 2d at 628.

[39] MISS. CODE ANN. §§ 11-21-1 to -51, -81 to -91 (1972). *See generally* Comment, *Mississippi Eminent Domain Law,* 44 MISS. L.J. 692, 696-713 (1973) (discussing Mississippi eminent domain procedures).

[40] *See, e.g.,* City of Miami Beach v. Manilow, 232 So. 2d 759, 761 (Fla. 1970) (state road department procedure in obtaining right of way strictly construed); Housemaster Corp. v. City of Kenner, 374 So. 2d 1240, 1242-43 (La. 1979) (notice and hearing requirements); New v. State Highway Comm'n, 297 So. 2d 821, 823 (Miss. 1974) (requirement that parties in interest be joined and properly notified); Mississippi Power Co. v. Leggett, 197 So. 2d 475, 479 (Miss. 1967) (proof requirement in setting out property to be condemned). *See generally* Miller, *Federal and State Condemnation Proceedings—Procedure and Statutory Background,* 14 VAND. L. REV. 1085, 1087 (1961) (constitutional provisions regulating eminent domain procedures); Comment, *supra* note 39, at 696 (same).

[41] *See, e.g.,* State v. 1.163 Acres, More or Less, Chuckwan Inc., 449 P. 2d 776, 778 (Alaska 1968) (applying civil rule pertaining to extension of time in which to appeal); Peeler v. Duval County, 66 So. 247, 250 (Fla. 1953) (applying statute governing crossclaim procedure); Board of Transp. v. Royster, 40 N.C. App. 1, 251 S.E.2d 921, 924 (1979) (applying rules governing joinder); Rickley v. Curtis Enterprises, Inc., 30 Ohio Misc. 82, 284 N.E.2d 207, 208 (1971) (applying discovery statutes to eminent domain proceedings). *But see* Biernacki v. Redevelopment Auth., 32 Pa. Commw. Ct. 537, 539, 379 A.2d 1366, 1368 (1977) (eminent domain code provides exclusive procedure); State Rd. Comm'n v. Hereford, 151 W.Va. 526, 153 S.E.2d 501, 504 (1967) (statute expressly removes rules on civil procedure from operation in court of eminent domain).

[42] *E.g.,* Stalford v. Board of County Comm'rs, 128 Colo. 441, 263 P.2d 436, 438 (1953) (amendments of petitions apply to eminent domain proceedings); State *ex rel.* State Highway Comm'n v. Burks, 79 N.M. 373, 443 P.2d 866, 867 (1968) (where a state

III. Evidence

Of the three cases decided this year which address evidentiary issues, only two are significant, and both involve the admissibility of party-opponent admissions as an exception to the hearsay rule.[43] In *Astro Transport v. Montez,*[44] the Mississippi Supreme Court held that the identity of a party as the declarant of a purported statement may be established by circumstantial evidence.[45] The case involved an action for damages resulting from an automobile accident.[46] At the trial, the defendant offered into evidence portions of a deposition given by the investigating officer. The defendant succeeded in excluding portions of the deposition relating to alleged statements he made at the scene of the accident,[47] contending that the officer could not precisely identify him as the party making the statement. On appeal, the court recognized that, despite the deponent's equivocation, the identity of the defendant as the declarant was clearly established through circumstantial evidence and held that the statements should have been admitted.[48]

Although there are various theories supporting the admissibility of admissions, it is generally recognized that admissions do not require

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statute so provides, rules of civil procedure apply to special statutory eminent domain proceedings except where there are inconsistent rules or statutory provisions).

[43] Haver v. Hinson, 385 So. 2d 605, 609 (Miss. 1980) (out-of-court statements of parents suing as next friend for injuries to minor child admissible as party-opponent admission); Astro Transp., Inc. v. Montez, 381 So. 2d 601, 605 (Miss. 1980) (identity of party as declarant of out-of-court admission may be established by circumstantial evidence). *See generally* Strahorn, *A Reconsideration of the Hearsay Rule and Admissions,* 85 U. Pa. L. Rev. 564, 569-88 (1937) (pt. 2) (discussion of the hearsay rule as applied to admissions). In the third case, Shaw v. Richardson, 391 So. 2d 213 (1980), the court held that broadly drafted pretrial motions should be overruled where they can be better addressed by specific objections at trial. *Id.* at 214.

[44] 381 So. 2d 601 (Miss. 1980).

[45] *Id.* at 605-06.

[46] *Id.* at 603.

[47] *Id.* at 604-05. The court found it significant that the deposition was originally taken and later admitted into evidence at the insistence of the defendant. *Id.* at 606.

[48] *Id.* at 605.

the assurances of trustworthiness that are normally required for hearsay exceptions.[49] Accordingly, many of the elements required for the use of declarations against interest are not required for admissions.[50] Admissions are admissible because the prior conduct of a party, whether by acts, speech, or writing, inconsistent with his testimony at trial, is a relevant fact.[51] Thus, an equivocation in testimony relating to that conduct logically should go to the weight and worth of the testimony rather than to its admissibility.[52] Following this line of reasoning, the court held that exclusion of the defendant's out-of-court statements constituted reversible error.[53]

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[49] *See* Maguire, *The Hearsay System: Around and Through the Thicket,* 14 VAND. L. REV. 741, 773-77 (1960) (exceptions to hearsay rule usually require necessity and trustworthiness); Morgan, *Hearsay Dangers and the Application of the Hearsay Concept,* 62 HARV. L. REV. 177, 183-85 (1948) (adversary system provides safeguards against abuse from admission of hearsay evidence); Strahorn, *supra* note 43, at 575-88 (admission characterized as conduct to which the hearsay rule does not apply). The federal rules of evidence classify admissions as nonhearsay rather than exceptions to the hearsay rule. FED. R. EVID. 801 (d)(2).

[50] There is no requirement that the admission be against the party's interest when it is originally made. *See, e.g.,* Hickey v. Anderson, 210 Miss. 455, 459, 49 So. 2d 713, 717 (1951) (admission not limited to facts against opponent's interest). *See generally* C. McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 262, at 628-31 (2d ed. 1972) (discussing rule that admissions are not equivalent to declarations against interest). Also, basic requirements relating to foundation and statements of opinion are not applicable to the declarant's statement. *See, e.g.,* United States v. Robinson, 530 F.2d 1076, 1083 n.13 (D.C. Cir. 1976) (foundation not required for use of party's admission); Bolden v. Gatewood, 250 Miss. 93, 104, 164 So. 2d 712, 731 (1964) (any statement made by a party which tends to establish or disprove any material fact is competent evidence against him).

For a discussion of the distinctions between admissions and declarations against interest, see Powell v. King, 33 Mich. App. 41, 189 N.W.2d 746, 747 n.3 (1971) (different prerequisites and rationale); Carpenter v. Davis, 435 S.W.2d 382, 384 (Mo. 1968) (admissions are made by party or one in privity with him; declarations are made by any other witness).

[51] *See, e.g.,* Employers Mut. Cas. Co. v. Mosqueda, 317 F.2d 609, 612-13 (5th Cir. 1963) (need not lay predicate for use of statements or acts which are inconsistent with contention advanced at the trial); SEC v. Glass Marine Indus., Inc., 194 F. Supp. 879, 882-83 (D. Del. 1961) (admissions not within purpose of the hearsay rule); Quincy Trading Post, Inc. v. Department of Revenue, 12 Ill. App. 3d 725, 298 N.E.2d 789, 794 (1973) (generally, any statement inconsistent with contention at trial is allowed as admission). *See generally* Strahorn, *supra* note 43, at 587 (admissions admissible as evidence of contradictory conduct of party).

[52] *See, e.g.,* Walker v. Blassingame, 17 Ala. 810, 812-13 (Ala. 1850) (failure to identify precise time and place of declaration goes to weight and not admissibility); Goshey v. Dunlap, 16 Ill. App. 3d 29, 305 N.E.2d 648, 652 (1973) (admission allowed despite failure to identify declarant by name); Wooten v. Curry, 50 Tenn. App. 549, 362 S.W.2d 820, 823 (1961) (meaning and weight of admission is question for jury).

In *Haver v. Hinson,*[54] another case decided by the Mississippi Supreme Court this year involving the admissibility of party-opponent admissions, the court held that out-of-court statements by parents suing as next friend for medical expenses incurred by their minor child were admissible.[55] The case involved allegations by a minor of personal injuries resulting from an automobile accident.[56] At the trial, the defendant, over the plaintiff's objection, offered testimony of the mother's out-of-court statement of belief that the accident was not the defendant's fault.[57] On appeal, the supreme court held that the testimony was admissible despite the rule preventing imputation of negligence from parent to child.[58] The court concluded that the parents, suing as next friend for medical expenses incurred by their minor child, had sufficient beneficial interest in that suit to be considered adversaries within the admissions exception.[59]

Although a party's own statement is admissible against him under Mississippi law,[60] a more complex question arises when the statement is made by someone other than the party of record. Mississippi ordinarily follows traditional approaches in dealing with admissions arising from the relationship between the party of record and the declarant.[61]

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[53] 381 So. 2d at 606.

[54] 385 So. 2d 605 (Miss. 1980).

[55] *Id.* at 609. The plaintiff, a minor, crawled beneath the defendant's automobile and was injured when the defendant drove away without noticing her. 385 So. 2d at 606-07. The court rejected the plaintiff's contention that the defendant's action was negligence per se under Miss. Code Ann. § 63-3-601 (1972), which requires drivers to exercise due care to avoid pedestrians, especially children and incompetents. 385 So. 2d at 608.

[56] 385 So. 2d at 608-09.

[57] *Id.* The defendant testified that on two separate occasions the child's mother had told the defendant that she was not at fault. *Id.*

[58] This rule is well established in Mississippi. *See* Bunch v. Shaw, 355 So. 2d 1383, 1385-86 (Miss. 1978) (citing St. Louis & S.F.R.R. v. Underwood, 194 F. 363, 365 (5th Cir. 1912)) (parent's negligence in maintaining dangerous condition on his property not imputable to child); Louisville, N.O. & T. Ry. v. Hirsh, 69 Miss. 126, 135, 13 So. 244, 245-46 (1891) (negligence of child, not her parent, to be considered by jury).

[59] 385 So. 2d at 609.

[60] *See, e.g.,* Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (guilty plea in criminal case held an admission in subsequent civil suit); Kelly v. King, 196 So. 2d 525, 527 (Miss. 1967) (same); Bolden v. Gatewood, 250 Miss. 93, 117-18, 164 So. 2d 721, 731 (1964) (any statement attributable to the party is an admission). *See generally* C. McCormick, *supra* note 50, at 629 (party's ability to explain his prior statements takes admissions out of hearsay rule).

[61] *See, e.g.,* Bullock v. Sam Ramsey, Jr. Trucking Co., 207 So. 2d 628, 631 (Miss. 1968) (employee acting in scope of employment); Cofer v. State, 158 Miss. 493, 498, 130 So. 511, 512 (1930) (co-conspirator); Interstate Co. v. Garnett, 154 Miss. 325, 355-56, 122

Generally, the admission of a party to the proceeding is admissible against him even though he is prosecuting or defending the action in a representative capacity.[62] The declarations or admissions of nominal parties to a proceeding, however, generally are not admissible against the real party[63] in the absence of some special interest or relationship between the two parties.[64] Thus, in the past, out-of-court statements by a guardian or next friend have not been admissible as party-opponent admissions.[65]

The court's decision in *Haver v. Hinson* to admit the testimony despite the absence of a special relationship seems justified. The parents, as next friend, control the litigation and ultimately reap the benefit or bear the loss of the outcome. Thus, it is logical that they be considered more than nominal parties.

IV. LIMITATIONS OF ACTIONS

The four cases involving limitations of actions decided by the Mississippi Supreme Court this year do not promise a significant impact on established law.[66] Three of these cases, however, warrant brief tex-

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So. 373, 381 (1929) (agent of corporation acting in scope of his agency). *See generally* Barton & Cowart, *The Enigma of Hearsay,* 49 MISS L.J. 31, 47-54 (1978) (discussion of admissions exception in Mississippi).

[62] *See, e.g.,* Sutton v. Russell's Ex'r, 236 Ky. 535, 33 S.W.2d 629, 630-31 (1930) (statements by executor held admissible in action against estate); Vecchio v. Metropolitan Life Ins. Co., 224 A.D. 301, 303, 230 N.Y.S. 131, 132-33 (1928) (statements by executor).

[63] *See, e.g.,* Mississippi Cent. R.R. v. Pillows, 101 Miss. 527, 528, 58 So. 483, 484 (1912) (in action against carrier, statement by father as next friend held inadmissible); Cook v. Edwards, 198 N.C. 738, 739, 153 S.E. 323, 324 (1930) (admission of father as next friend concerning unavoidability of accident held inadmissible); Adams v. Mackleer, 239 Pa. Super. Ct. 244, 361 A.2d 439, 441 (1976) (out-of-court statement by mother as guardian not admissible in suit brought by her son).

[64] *See* note 61 *supra.*

[65] *See* note 63 *supra.* In contrast, where the court considers a person who is not a party to the action to be a real party in interest, his statements may be allowed as admissions. *E.g.,* A.N. Deringer, Inc. v. United States, 287 F. Supp. 1016, 1023 (Cust. Ct. 1968) (letterhead of ultimate consignee admitted as admission); Farmers Union Warehouse Co. v. Barnett Bros., 233 Ala. 435, 137 So. 176, 177-78 (1931) (admission by third party general manager of party corporation admitted).

[66] James v. Jackson Prod. Credit Ass'n, 389 So. 2d 494, 496-97 (Miss. 1980) (execution of renewal notes prior to running of statute of limitations coupled with acknowledgement of indebtedness in margin of deed of trust is effective to toll statute of limitations); Peoples Bank & Trust Co. v. Kinsey, 385 So. 2d 615, 616-18 (Miss. 1980) (reference to "series of notes" in MISS. CODE ANN. § 15-1-23 (1972) applies to installment notes, not a succession of separate notes); Byrd v. Page, 384 So. 2d 1038, 1040-41 (Miss. 1980) (running of two-year statute of limitations begins at date of final decree of execu-

tual treatment. In *Ryan v. Wardlaw,*[67] the court opened another avenue for application of the statute commonly known as the "saving statute."[68] Originally, the suit had been improperly dismissed by the trial court. On a motion by the plaintiff, the cause was reinstated.[69] The cause, however, had been reinstated erroneously after the last day of the term. Therefore, the cause was removed from the docket by the trial court.[70] After the suit was refiled by the plaintiff, it was again dismissed on the ground that it had been filed beyond the six-year statute of limitations[71] which had run a few days before the date of refiling.[72] On appeal, the supreme court held that the refiling fell within the one-year extension allowed for cases which have been dis-

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tor's final accounting and is not dependent upon filing by chancery clerk); Ryan v. Wardlaw, 382 So. 2d 1078, 1079-81 (Miss. 1980) (dismissal for want of jurisdiction considered a matter of form and thus within the purview of the "saving statute").

[67] 382 So. 2d 1078 (Miss. 1980).

[68] The statute, codified at Miss. Code Ann. § 15-1-69 (1972), provides in pertinent part:

> [I]n any action, duly commenced within the time allowed, the writ shall be abated, or the action otherwise avoided or defeated, by the death of any party thereto, or for any matter of form . . . , the plaintiff may commence a new action for the same cause, at any time within one year after the abatement or other determination of the original suit . . . .

[69] 382 So. 2d at 1079. The court minutes indicated that the case had become stale. The case was reinstated because the plaintiffs showed that neither party had been dilatory. *Id.*

[70] *Id.* Although the court's determination that it lacked jurisdiction was not an issue, it is recognized that a court may not act upon a motion in vacation except where jurisdiction is conferred by statute. *See, e.g.*, Evers v. Truly, 317 So. 2d 414, 417 (Miss. 1975) (motion may be determined in vacation upon written notice and motion by either party except where final disposition of case has been made); Sperier v. Ward, 233 So. 2d 823, 825 (Miss. 1970) (court powerless to act except as authorized by statute governing vacation matters); Hyde Constr. Co. v. Highway Materials Co., 248 Miss. 564, 574, 162 So. 2d 856, 856 (1964) (action by court in vacation without statutory authority is void).

Miss. Code Ann. § 11-7-121(2) (1972) provides that motions may be heard in vacation only on 10 days notice to the attorney of record for the opposing party.

[71] 382 So. 2d at 1079. The tort action arose from a 1965 accident. Because the plaintiff was a minor at the time of the accident, he was empowered to bring the action within six years from the date of reaching majority. The relevant statutes are: Miss. Code Ann. § 15-1-49 (1972), which provides that "[a]ll actions for which no other period of limitation is prescribed shall be commenced within six years after the cause of such action accrued . . . ."; and Miss. Code Ann. § 15-1-59 (1972), which provides that "[i]f any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy . . . he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed."

[72] 382 So. 2d at 1079.

missed for lack of jurisdiction.[73] The appellee contended that the cause was never properly placed on the docket and thus could not have been dismissed for lack of jurisdiction.[74] The court, however, held that the suit fell within the purview of section 15-1-69 which allows a one-year extension to any action commenced within the applicable limitation period and later dismissed for any matter of form.[75]

Byrd v. Page[76] involved the two year period found in section 91-7-309 in which a petition may be brought to reopen an estate.[77] The issue presented was whether the final settlement of the estate had been made in accordance with sections 91-7-291 and 91-7-297 of the Mississippi Code.[78] All interested parties, including the plaintiff, had been

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[73] *Id.* at 1080. *See, e.g.*, Frederick Smith Enterprise Co. v. Lucas, 204 Miss. 43, 51-53, 36 So. 2d 812, 814 (1948) (suit dismissed in federal court for lack of jurisdiction considered within the purview of the "saving statute"); Hawkins v. Scottish Union & Nat'l Ins. Co., 110 Miss. 23, 25-27, 69 So. 710, 711 (1915) (suit in state court dismissed for lack of jurisdiction within ambit of "saving statute").

[74] 382 So. 2d at 1081.

[75] *Id.* at 1080-81 (citing MISS. CODE ANN. § 15-1-69 (1972)); *see, e.g.*, Young v. Walker, 70 Miss. 813, 820-22, 12 So. 901, 902 (1893) (dismissal for multifariousness considered a matter of form). *But see* Kincade v. C. & L. Rural Elec. Coop. Corp., 276 F.2d 929, 930 (5th Cir. 1960) ("saving statute" does not apply to action instituted in another state); Ward v. Pennsylvania Fire Ins. Co., 82 Miss. 124, 129, 33 So. 841, 842 (1903) ("saving statute" not applicable to suit barred by insurance policy).

[76] 384 So. 2d 1038 (Miss. 1980).

[77] MISS. CODE ANN. § 91-7-309 (1972) provides in pertinent part:

> Any person interested may, at any time within two years after final settlement, by bill or petition, open the account of any executor, administrator, or guardian and surcharge and falsify the same . . . . Such bills or petitions may be filed without leave of the court or chancellor, and evidence shall be admissible in such cases to show the falsity of the account. Such bills and petitions shall not be governed by the rules applicable to bills of review in chancery, but in such cases it will be the duty of the court to correct any errors of law or fact occurring in the final settlement of the executor, administrator, or guardian.

[78] 384 So. 2d at 1040-41. MISS. CODE ANN. § 91-7-291 (1972) provides in pertinent part:

> When the estate has been administered by payment of the debts and the collection of the assets, it shall be the duty of the executor or administrator, unless the court or chancellor, on cause shown, shall otherwise order, to make and file a final settlement of the administration by making out and presenting to the court, under oath, his final account . . . .

MISS. CODE ANN. § 91-7-297 (1972) provides in part:

> If process be returned executed, or publication has been made, the court shall examine the final account so presented and filed, hear the evidence in support of it, and the objections and evidence against it. If the court shall be satisfied that the account is correct and supported by legal vouchers where required to be filed or produced for inspection, it shall make a final decree of approval and allowance . . . . In proceedings for a final settlement, the court

joined in the petition for final accounting and a final decree approving the petition had been issued by the chancellor.[79] The plaintiff, however, contended that no final settlement was made due to the clerk's failure to mark the final account as having been filed.[80] The court held that final settlement was made on the date that the final decree was issued; therefore, the estate could be reopened only by an allegation of fraud.[81] While the plaintiff's petition, which had been filed within the two-year period, alleged that certain property had been sold to persons in a confidential relationship with the executor for an inadequate price,[82] the court held that the language of the petition did not contain a specific allegation of fraud and thus did not bar the running of the statute of limitations.[83]

In the third case involving limitations of actions, the court was called upon to interpret the language of section 15-1-23 of the Mississippi Code, which provides that no action may be brought on a series of three or more notes secured by a mortgage, deed of trust, or otherwise unless it is brought within one year from the date of foreclosure or sale of the property pledged as security for the notes.[84] In *Peoples Bank & Trust Co. v. Kinsey*,[85] four separate notes were given under a line of credit. Each note was endorsed by the defendant and secured by property owned by the defendant's business.[86] Upon default, the plain-

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may allow any party interested to surcharge and falsify any annual or partial settlement of the executor or administrator.

[79] 384 So. 2d at 1040.

[80] *Id.* at 1041. The executor or administrator is discharged only as to those matters and to those parties embraced in the final petition. *See, e.g.*, Stutts v. Deposit Guar. Nat'l Bank, 233 So. 2d 794, 795-96 (Miss. 1970) (administrator retained capacity as such where final decree was conditioned on filing of vouchers which were not filed); Pollock v. Buie, 43 Miss. 140, 155-56 (1870) (final settlement does not discharge administrator as to property not accounted for or distributed).

[81] 384 So. 2d at 1041. Where a party has been joined in a petition for discharge and final distribution, he generally is barred from bringing further proceedings concerning the same matter. *See* Smith v. Bank of Clarksdale, 374 So. 2d 776, 781 (Miss. 1979) (executor estopped from reopening by his prior petition for discharge); Shepard v. Townsend, 249 Miss. 383, 391, 162 So. 2d 878, 880-81 (1964) (decree of final distribution conclusive as to parties).

[82] 384 So. 2d at 1041.

[83] *Id. See* Citizens Nat'l Bank v. First Nat'l Bank, 347 So. 2d 964, 969 (Miss. 1977) (petition charging fraud must show sufficient facts to reveal such); McMahon v. McMahon, 247 Miss. 822, 836, 157 So. 2d 494, 501 (1963) (same); Co-operative Oil Co. v. Greenwood Agency Co., 148 Miss. 536, 558-59, 114 So. 397, 403 (1927) (party relying on fraud must positively allege it).

[84] MISS. CODE ANN. § 15-1-23 (1972).

[85] 385 So. 2d 615 (Miss. 1980).

[86] *Id.* at 616.

tiff brought suit on the notes after having sold various items of collateral pursuant to the remedies provided by the Uniform Commercial Code.[87] The issue confronting the court was whether the notes in the instant case were a "series of notes" within the meaning of section 15-1-23.[88] In its decision, the court noted that no prior construction of the language had been given in Mississippi or in any other jurisdiction.[89] The court, however, considered it logical to conclude that the legislature intended the language to apply to an installment note or series of notes given for a single indebtedness rather than to a succession of separate notes.[90] Considering the statute's history, the court's decision again seems justified.[91]

V. Legislative Enactments

During the 1980 regular session, the Mississippi Legislature enacted five bills affecting civil procedure in the state courts.[92] One of the more notable enactments is the amendment to the Mississippi attachment statute which is discussed in the commercial law section of this issue.[93] Of the remaining enactments, perhaps the most significant is the amendment to the Mississippi long-arm statute.[94] The statute as amended allows a nonresident plaintiff to obtain service of process upon a nonresident defendant who has committed a tort in whole or in part within the state against that plaintiff.[95] In the past, the statute had been interpreted as existing for the benefit of residents only;[96] the state was not required by any constitutional provision to make its courts available to nonresidents who sought to sue other nonresidents.[97] The state courts, however, had been available to foreign corporations which did business in the state.[98] The decision by the legislature to open the state's courts to all nonresidents who have been damaged within the state seems justified in that the plaintiff logically should be allowed a forum within the state in which the tort was committed. Moreover, the plaintiff is no longer faced with the question whether he is qualified to do business in the state within the meaning of the former statute.[99]

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[87] Miss. Code Ann. § 75-9-105(1)(i), -503, -504(3) (1972).

[88] The pertinent language provides that "[i]n all cases, no suit or action shall hereafter be commenced or brought upon any installment note, or series of notes of three or more . . . , unless the same is commenced or brought within one year from the date of foreclosure or sale of the property . . . . " Miss. Code Ann. § 15-1-23 (1972).

[89] 385 So. 2d at 617.

[90] *Id.* at 617-18.

[91] The law as originally passed was intended as "[a]n act to fix the period of limitations within which suits may be brought on notes secured by mortgages, trust deeds, or otherwise, where such mortgages have been foreclosed." Act of April 4, 1934, ch. 251, 1934 Miss. Laws 525, 525 (uncodified preamble). The supreme court, however, interpreted the purpose of the law to be the alleviation of distressed mortgage debtors during the depression. Lewis v. Simpson, 176 Miss. 123, 129, 167 So. 780, 781 (1936).

[92] The new legislation discussed in this section includes Act of May 26, 1980, ch. 533, § 1, 1980 Miss. Laws 1291 (amending Miss. Code Ann. § 11-3-23 (1972)) (damage assessments when supreme court affirms judgment or decree of lower court); Act of May 5, 1980, ch. 437, 1980 Miss. Laws 825 (amending Miss. Code Ann. § 13-3-57 (1972)) (long-arm statute); Act of May 26, 1980, ch. 549, §§ 1, 2, 1980 Miss. Laws 1307, 1308 (amending Miss. Code Ann. §§ 85-3-1 to -4 (1972)) (garnishment statute); Act of April 25, 1980, ch. 371, 1980 Miss. Laws 670 (codified at Miss. Code Ann. §§ 89-1-301 to -329 (Supp. 1980)) (statute granting relief from foreclosure following disaster).

[93] *See 1980 Mississippi Supreme Court Review: Corporate & Commercial Law,* page 441 *infra.*

[94] Miss. Code Ann. § 13-3-57 (Supp. 1980).

Other bills enacted during the 1980 session include an amendment to the statute which provides for assessment of a fine or penalty against an unsuccessful appellant when the supreme court affirms the judgment of a lower court.[100] In the past, a set rate of five percent of the amount in controversy was assessed in certain cases.[101] In obvious response to rising costs and interest rates, the legislature raised the assessment rate to fifteen percent.[102] The legislature also enacted permanent emergency relief legislation providing for relief from mortgage foreclosure during major disasters in the state.[103]

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[95] *Id.*

[96] *See* Washington v. Norton Mfg., Inc., 588 F.2d 441, 444-45 (5th Cir.) (Mississippi's long-arm statute cannot be invoked by a nonresident plaintiff), *cert. denied,* 442 U.S. 942 (1979); Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716, 720 (5th Cir. 1978) (same). *See generally* Brown & Scott, *In Personam Jurisdiction Under Mississippi's Long Arm Statute,* 43 Miss. L.J. 1, 12 (1972) (discussing traditional interpretation).

[97] *See, e.g.,* Breeland v. Hide-A-Way Lake, Inc., 585 F.2d 716, 720-21 (5th Cir. 1978) (privileges and immunities argument dismissed); Sugg v. Hendrix, 142 F.2d 740, 743 (5th Cir. 1944) (not discriminatory under the 14th amendment); American Int'l Pictures, Inc. v. Morgan, 371 F. Supp. 528, 532 (N.D. Miss. 1974) (state not constitutionally required to make courts available to nonresidents).

[98] *See* Arrow Food Distrib., Inc. v. Love, 361 So. 2d 324, 327 (Miss. 1978) (Mississippi courts available to foreign corporations doing business in state); C.H. Leavell & Co. v. Doster, 211 So. 2d 813, 814 (Miss. 1968) (same). Adhering to the proposition that only residents could benefit from the statute, the supreme court in *Doster* classified foreign corporations qualified to do business within the state as residents. *Id.* at 814.

[99] To prove residency under judicial interpretation of the previous long-arm statute, a nonresident business had to prove it was qualified to do business in the state. C.H. Leavell & Co. v. Doster, 211 So. 2d 813, 814 (Miss. 1968); *see* note 98 *supra.*

[100] Act of May 26, 1980, ch. 533, § 1, 1980 Miss. Laws 1291 (amending Miss. Code Ann. § 11-3-23 (1972)).

[101] Miss. Code Ann. § 11-3-23 (1972) (amended 1980).

[102] Miss. Code Ann. § 11-3-23 (Supp. 1980).

A significant change was made by the legislature with the enactment of a bill to amend the statute controlling exempt property.[104] The purpose of the amendment was to place the section of the statute pertaining to wage garnishment in conformity with the Federal Consumer Credit Protection Act.[105] The statute provides that wages are completely exempt from seizure for thirty days from the date of levy by attachment, execution, or garnishment.[106] Following the thirty-day grace period, wages are exempt only up to the amount prescribed by the statute.[107] The grace period, which is designed to furnish relief to the debtor, may provide a problem for the creditor, in light of the supreme court's decision this year in *Leasy v. Zollicoffer*.[108] There, the court held that a writ of garnishment is effective against an employee's wages only until the return day of the writ or until the full amount of the judgment has been collected, whichever occurs first.[109] Although the case was decided after the effective date of the amendment, the decision was based upon the statute as it existed prior to that date.[110]

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[103] Act of April 25, 1980, ch. 371, 1980 Miss. Laws 670 (codified at Miss. Code Ann. §§ 89-1-301 to -329 (Supp. 1980)).

[104] Act of May 26, 1980, ch. 540, §§ 1, 2, 1980 Miss. Laws 1307 (amending Miss. Code Ann. §§ 85-3-1, -4 (1972)). Additional changes were made in the 1981 legislative session. Act of April 7, 1981, ch. 469, §§ 3, 4, 1981 Miss. Laws ___ (amending Miss. Code Ann. §§ 85-3-1, -4 (Supp. 1980)).

[105] Act of May 6, 1980, ch. 540, 1980 Miss. Laws 1307 (uncodified preamble); *see* Consumer Credit Protection Act, 15 U.S.C. §§ 1671-1677 (Supp. 1979) (federal restriction on garnishment).

[106] Miss. Code Ann. § 85-3-4 (Supp. 1980). The amendments enacted in the 1981 session exempt wages from seizure for 30 days from the date of service of any writ of attachments, execution, or garnishment rather than from the date of levy. Act of April 7, 1981, ch. 469, § 4, 1981 Miss. Laws ___ (amending Miss. Code Ann. § 85-3-4 (Supp. 1980)).

[107] Miss. Code Ann. § 85-3-4 (Supp. 1980). The maximum garnishable wage is the lesser of either (1) 25% of disposable earnings for that week or (2) 30 times the federal minimum wage. *Id.*

[108] 389 So. 2d 1378 (1980).

[109] *Id.* at 1380-81.

[110] *Id.* The court held that Miss. Code Ann. § 85-3-1(10)(a) (1972) (amended 1980) did not require the garnishee to withhold wages beyond the return day of the garnishment writ, 389 So. 2d at 1381, despite the language in the statute which provided:

> The garnishee shall retain . . . the wages, salary or other compensation of the laborer or employee during such period of time as it is necessary to accumulate a sum equal to the amount shown as due the court on the writ or levy, at which time the garnishee shall pay the same into the court.

Miss. Code Ann. § 85-3-1(10)(a) (1972) (amended 1980). A similar provision is included in the amended statute, yet it applies only to wages earned after the grace period's expi-

The court's holding, therefore, failed to take into account the grace period provided by the Act.[111] If the decision is allowed to stand, a garnishment writ would be ineffective as a means of debt collection. The weight of the court's decision is unclear in light of the recent amendment. While the court interpreted language which remains in the statute, it is unlikely that the holding will be applied to the statute as it now exists.

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ration. *Id.* § 85-3-4(1) (Supp. 1980). In interpreting the statute, the court relied on cases decided prior to the addition of the above quoted language. 389 So. 2d at 1380-81.

[111] 389 So. 2d at 1379 n.1. The court concluded that the new statute was not germane to the case since the events occurred before its effective date. *Id.*

CORPORATE & COMMERCIAL LAW

I. Corporate Law

In 1980, the Mississippi Supreme Court rendered two decisions affecting the area of corporate law, both of which will be treated in this section.

A. *Standing to Sue*

In *Bruno v. Southeastern Services, Inc.,*[1] the Mississippi Supreme Court considered whether the sole stockholder of a corporation has the right to maintain an action in his individual capacity to seek redress of a wrongful injury to the corporation which results in the diminution or destruction of the value of the corporate stock.[2] The defendant, Southeastern Services, Inc., allegedly breached its contract with Bruneau's, Inc. to invest equity capital in the corporation and to guarantee a loan of the corporation.[3] The alleged breach forced a declaration of bankruptcy by Bruneau's, Inc., which caused the value of Bruno's stock to be destroyed.[4]

The court has long recognized the principle that "a corporation is an entity separate and distinct from its stockholders."[5] Given this principle, and the determination that the premise for the plaintiff's complaint was the breach of a contract between the defendant and the corporation,[6] the Mississippi Supreme Court held that the plaintiff has no individual right of action against third persons for injuries to the corporation, even though the injury was the diminution or destruction of the value of the corporate stock.[7] This is true, the court noted, whether the action arises in contract or in tort, and applies even though the stockholder owns all or substantially all of the stock in the corporation. The individual stockholder's rights are merely derivative; the cause of action is the corporation's. Consequently, the court determined that the plaintiff could only assert the cause of action in his representative capacity in a shareholder's derivative suit with the corporation joined as an indispensable party.[8]

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[1] 385 So. 2d 620 (Miss. 1980).

[2] *Id.* at 621.

[3] *Id.* at 620-21. The complaint further set out counts of malicious interference with the right to pursue a legitimate business, fraud, and deceit. *Id.*

[4] *Id.* at 621. Bruno owned one hundred percent of the stock in Bruneau's, Inc. *Id.* at 620.

[5] *Id.* at 621. This is a settled rule in Mississippi. *E.g.,* Illinois Cent. R.R. v. Mississippi Cotton Seed Prods. Co., 166 Miss. 579, 589, 148 So. 371, 372 (1933) (stating the rule); *accord,* United States v. State Tax Comm'n, 505 F.2d 633, 637 (5th Cir. 1974) (recognizing Mississippi follows separate and distinct entity concept); Childers v. Beaver Dam Plantation, Inc., 360 F. Supp. 331, 335 (N.D. Miss. 1973) (same).

[6] 385 So. 2d at 622-23.

[7] *Id.* at 622.

The court's decision is clearly consistent with the weight of authority. It is well established among the jurisdictions that a stockholder has no individual right of action against third persons for acts producing injury to a corporation, since, absent a showing of the violation of some duty owed to the individual shareholder personally,[9] the harm suffered by the shareholder is merely incidental to the wrong suffered by the corporation.[10] This rule is applied even where the complaining shareholder holds all or substantially all of the stock.[11] As noted in the Mississippi Supreme Court's opinion,[12] several cogent factors underlie the general tenet: (1) the corporation is an entity separate and distinct from its stockholders, who have no cognizable legal interest in its property; (2) the rights of the stockholders are merged in the rights of the corporation, and, if the stockholders sustained any loss or injury, it would inure initially to the corporation and then to the individual stockholders in proportion to their respective holdings in the corporation; (3) one corporate action avoids a multiplicity of suits by individual stockholders; and (4) since recovery belongs to the corporation, impairment of creditors' rights will be avoided.[13]

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[8] *Id.*

[9] *E.g.*, Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968) (action to redress injuries to corporation cannot be maintained by stockholder in his own name unless it involves violation of duty owed directly to him); Mullins v. First Nat'l Exch. Bank, 275 F. Supp. 712, 721 (W.D. Va. 1967) (because frozen assets did not belong to plaintiff individually, the wrong was suffered only by the corporation); Sacks v. American Fletcher Nat'l Bank and Trust Co., 279 N.E.2d 807, 812 (Ind. 1972) (personal guaranty for a loan to a corporation held basis for a personal action); *cf.* Stidham v. State Bank, 126 Kan. 336, 268 P. 106, 107-08 (1928) (bank stockholder can maintain action for damages sustained by him under statute making it illegal to circulate any rumor with intent to injuriously affect the financial status of any bank or individual).

[10] *E.g.*, Schaffer v. Universal Rundle Corp., 397 F.2d 893, 894 (5th Cir. 1968) (action for breach of contract and violations of Sherman Antitrust Act and Robinson-Patman Price Discrimination Act); Arctic Contractors, Inc. v. State, 573 P.2d 1385, 1386 (Alaska 1978) (rule extends to counterclaims); Bevelheimer v. Gierach, 33 Ill. App. 3d 988, 339 N.E.2d 299, 302-04 (App. Ct. 1975) (action predicated on alleged failure to renew lease); Maki v. Ziehm's Estate, 55 A.D.2d 454, 391 N.Y.S.2d 705, 707 (1977) (action for conversion and misappropriation of assets). *See generally* 6 Z. CAVITCH, BUSINESS ORGANIZATIONS § 119.01[1] at 119-16 to 119-18 (rev. ed. 1980) (general rule set forth and explained); 13 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5908 at 303 (perm. ed. 1980) (same); Annot., 167 A.L.R. 279, 280-84 (1947) (discussion of cases illustrating general rule).

[11] *E.g.*, Kreager v. General Elec. Co., 497 F.2d 468, 470, 472 (2d Cir.) (sole stockholder of corporation has no standing to bring private antitrust action), *cert. denied*, 419 U.S. 861 (1974); Schaffer v. Universal Rundle Corp., 397 F.2d 893, 896 (5th Cir. 1968) (general rule is applicable where individual is sole stockholder); Collum v. General Motors Acceptance Corp., 115 S.W.2d 1196, 1200 (Tex. Civ. App. 1938) (no individual cause of action even though majority or all of capital stock held by complaining stockholder).

[12] 385 So. 2d at 622 (quoting 6 Z. CAVITCH, *supra* note 10, § 199.03[1] at 119-18).

With the adoption of the rule set forth in *Bruno,* Mississippi has aligned itself with the majority of jurisdictions in holding that a stockholder lacks the capacity to maintain an action against a third person where the gravamen of the action is a wrong to the corporation.[14] The rule is a sound one in view of its underlying policy reasons—maintenance of the corporate personality to protect creditors, avoidance of multiple suits, and continuance of corporate control over the disposition of recovered damages.[15]

B. Dissolution

Even prior to the adoption of section 79-3-193 of the Mississippi Business Corporation Act,[16] the Mississippi Supreme Court, relying on the inherent powers of equity courts and state statutes, acknowledged the right of a minority shareholder to request dissolution of a corporation.[17] A court of chancery, however, could not grant this request unless the minority shareholder was able to prove: (1) that the corporation was insolvent; (2) that the management was such as would lead to insolvency; (3) that the corporation had ceased to be a going concern; or that (4) while insolvent, the corporation sold its franchise(s) in whole or in part.[18] The early grounds for involuntary dissolution were supplanted by section 79-3-193, patterned on the Model Business Corporation Act rule.[19] In *Capitol Toyota, Inc. v. Gervin*[20] the court considered whether the discharge, because of inadequate management, of a minority shareholder by the majority shareholders was an action of such a nature as to justify involuntary dissolution on the statutory ground of oppression. Without setting forth a definitive statement as to what constitutes oppressive conduct, the court concluded that termination of the minority shareholder's employment with the corporation was not so oppressive as to warrant the involuntary dissolution of the corporation.[21]

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[13] 385 So. 2d at 622.

[14] *See* notes 9 through 11 and accompanying text *supra.*

[15] *See* notes 11, 12 and accompanying text *supra.*

[16] MISS. CODE ANN. § 79-3-193 (1972).

[17] The Mississippi Supreme Court first acknowledged the power of a chancery court to order dissolution of a going corporation at the behest of its minority stockholders in Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 891, 60 So. 1018, 1020 (1912). In 1840, the Superior Court of Chancery had held that chancery courts lacked this power. Boyles v. Orne, 1 Miss. (Freeman ch.) 159, 173-74 (1840).

A statutory right to dissolution also existed prior to the passage of § 79-3-193. Act of March 11, 1912, ch. 142, 1912 Miss. Laws 147 (current version at MISS. CODE ANN. § 79-3-193 (1972)). The supreme court, however, in Hyman Mercantile Co. v. Kiersky, 192 Miss. 195, 205, 4 So. 2d 881, 883-84 (1940), held that the statutory remedy was not exclusive.

[18] *See* Welsh v. Clinton Lumber & Supply Co., 232 Miss. 507, 515, 99 So. 2d 660,

In support of its holding, the court cited *Exadaklitos v. Cinnaminson Realty Corp.*[22] In *Exadaklitos* the plaintiff brought an "oppressed shareholder" suit after the majority shareholders terminated his employment with the corporation.[23] The New Jersey court noted

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663-64 (1958) (dissolution denied because there was no evidence of corporate sale of franchises while insolvent and conflicting evidence of corporate insolvency and continuation as a going concern); Hudson v. Belzoni Equip. Co., 211 Miss. 178, 188, 51 So. 2d 223, 225-26 (1951) (dismissal because evidence proved corporation's solvency and management had increased the value of stock on a more than seven-to-one ratio); Hyman Mercantile Co. v. Kiersky, 192 Miss. 195, 203, 205, 4 So. 2d 881, 883-84 (1940) (dissolution denied because there was no claim of insolvency and the evidence established that the officers' management led to increase in assets and net profits); Brent v. B.E. Brister Sawmill Co., 103 Miss. 876, 896, 60 So. 1018, 1022 (1912) (dissolution may be granted where evidence establishes gross mismanagement and misapplication of corporate property or the need for protection of assets).

[19] Miss. Code Ann. § 79-3-193 (1972) provides:

> The chancery court shall have full power to liquidate the assets and business of a corporation: (a) In an action by a shareholder when it is established:
> (1) That the directors are deadlocked in the management of the corporate affairs and the shareholders are unable to break the deadlock, and that irreparable injury to the corporation is being suffered or is threatened by reason thereof; or
> (2) That the acts of the directors or those in control of the corporation are illegal, oppressive or fraudulent; or
> (3) That the shareholders are deadlocked in voting power, and have failed, for a period which includes at least two (2) consecutive annual meeting dates to elect successors to directors whose terms have expired or would have expired upon the election of their successors; or
> (4) That the corporate assets are being misapplied or wasted.

It may be plausibly argued that subsections (3) and (4) codify the Mississippi case law previously governing dissolution. *See* note 18 and accompanying text *supra* discussing Mississippi's previous requirements for dissolution.

[20] 381 So. 2d 1038 (Miss. 1980).

[21] *Id.* at 1039.

[22] 167 N.J. Super. 141, 400 A.2d 554 (Super. Ct. Law Div. 1980).

[23] 400 A.2d at 562. The evidence established that the plaintiff's failure to get along

that other jurisdictions had held that corporate decisions made within the business judgment rule were not proper subjects for oppression claims.[24] It also noted that the Virginia Supreme Court had endorsed the alternative definitions of oppression taken from English cases: (1) " 'a visible departure from the standards of fair play on which every shareholder who entrusts his money to a company is entitled to rely' " and (2) " 'a lack of probity and fair dealing in the affairs of a company to the prejudice of some of its members.' "[25] It complained, however, that these standards were so abstract that they were inadequate to guide a determination of what was oppressive or unfair. The court turned to local law for its answer and concluded that an examination of corporate conduct toward the complaining shareholder in his various roles with the corporation—shareholder, director, officer, or employee—was the correct approach.[26] Utilizing this approach, the court found that the thwarting of a minority shareholder's expectations did not constitute oppressive action toward him, and refused dissolution.[27]

Though a number of states have adopted involuntary dissolution statutes which are similar to Mississippi's and which contain an "oppressive conduct" provision,[28] the task of ascertaining and defining "oppressive conduct" has fallen to the court. More often than not, the

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with other employees caused the loss of key personnel, that he quit on several occasions without notice or reasons, and that he had conflicts with other principals. Based on these facts, the court concluded that the plaintiff's discharge was the result of unsatisfactory performance. *Id.* at 561.

[24] *Id.* at 559 (citing Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792, 795-96 (App. Ct. 1962)).

[25] 400 A.2d at 559-60 (quoting White v. Perkins, 213 Va. 129, 134, 189 S.E.2d 315, 319-20 (1972)).

[26] 400 A.2d at 560. The court noted that its approach was unique because most other statutes limit the court's examination of corporate conduct to the shareholder's capacity.

[27] *Id.* at 561-62. The court held that oppressive conduct by the controlling shareholders was absent because the promise to provide the plaintiff with employment had been performed, and his participation in management had been thwarted by his failure to meet the condition precedent of learning the business. *Id.*

[28] ALASKA STAT. § 64-908(A)(2) (repl. 1980); ILL. ANN. STAT. ch. 32, § 157.86(a)(3) (Smith-Hurd) (Supp. 1980); IOWA CODE ANN. § 496A.94(1)(c) (West Supp. 1980); MICH. COMP. LAWS ANN. § 450.1825(1) (1973); MO. ANN. STAT. § 351.485.1(1)(b) (Vernon 1966); MONT. CODE ANN. § 35-1-921(1)(a)(ii) (1979); NEB. REV. STAT. § 21-2096(1)(b) (1977); N.J. REV. STAT. § 14A:12-7(1)(c) (Supp. 1980); N.M. STAT. ANN. § 53-16-16(A)(1)(b) (1978); N.D. CENT. CODE § 10-21-16(1)(b) (repl. 1976); R.I. GEN. LAWS § 7-1.1-90(a)(2) (1970); S.D. COMP. LAWS ANN. § 47-7-34(2) (1967); TENN. CODE ANN. § 48-1008(1)(a)(iii) (repl. 1979); UTAH CODE ANN. § 16-10-92(a)(2) (Supp. 1979); VT. STAT. ANN. tit. 11, § 2067(a)(1)(B) (1973); VA. CODE § 13.1-94(a)(2) (repl. 1978); WASH. REV. CODE § 23A.28.170(1)(b) (1969); WYO. STAT. § 17-1-614(a)(i)(B) (1977).

opinions simply illustrate what is not oppressive conduct.[29] One jurisdiction has stated that the term:

> does not carry an essential inference of imminent disaster; it can . . . contemplate a continuing course of conduct. . . . [T]he word 'oppressive' does not necessarily savor of fraud, and . . . the absence of 'mismanagement, or misapplication of assets' does not prevent a finding that the conduct [of those in control] has been oppressive.[30]

Other jurisdictions are inclined to quote the language from English cases set forth in the *Exadaklitos* opinion.[31] When courts have found that majority stockholders have engaged in oppressive conduct, this conduct is often the cumulative effect of several actions which prevent minority shareholders from participating in the management of the corporation.[32] Actions which might otherwise be considered oppressive, however, are often excused under the business judgment rule.[33]

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[29] *See, e.g.,* Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N.E.2d 45, 47-49 (1957) (refusal of directors, or those in control, either to discontinue a solvent but unprofitable corporate venture or liquidate the corporation, is not grounds of oppression); Long v. Norwood Hills Corp., 380 S.W.2d 451, 477-78 (Mo. App. 1964) (directors' failure to declare dividends where management properly used profits for improvement of corporate properties not illegal, oppressive or fraudulent); Baker v. Commercial Body Builders, Inc., 264 Or. 614, 507 P.2d 387, 398 (1973) (prohibition of access to corporate records and failure to give notice of shareholders' meetings constituted oppressive conduct, but was not serious enough to warrant dissolution).

[30] Central Standard Life Ins. Co. v. Davis, 10 Ill. 2d 566, 141 N.E.2d 45, 50 (1957).

[31] *E.g.,* Fix v. Fix Material Co., 538 S.W.2d 351, 358 (Mo. App. 1976) (quoting Elder v. Elder & Watson, Ltd., [1952] Sess. Cas. 49, 50 (Scot. 1st Div. 1951); Scottish Coop. Wholesale Ltd. v. Meyer, [1959] A.C. 324 (Scot. 1958)); Baker v. Commercial Body Builders, Inc., 264 Or. 614, 507 P.2d 387, 393 (1973) (same). *See generally* Comment, *Oppression as a Statutory Ground for Corporate Dissolution,* 1965 DUKE L.J. 128, 133-35 (discussing common law grounds for dissolution: oppression and breach of duty).

[32] *E.g.,* Gidwitz v. Lanzit Corrugated Box Co., 20 Ill. 2d 208, 170 N.E.2d 131, 136-38 (1960) (cumulative effect of denial of shareholders' corporate rights and privileges held sufficiently oppressive to warrant dissolution); Compton v. Paul K. Harding Realty Co., 6 Ill. App. 3d 488, 285 N.E.2d 574, 581 (Ct. App. 1972) (failure to call directors' meeting and to consult with minority shareholders, an imperious attitude toward inquiry about salary, and dilatory reaction to shareholder requests constituted oppressive behavior); *cf.* Browning v. C & C Plywood Corp., 248 Or. 574, 434 P.2d 339, 343 (1967) (where purpose of stock increase was to squeeze out the plaintiff, conduct was oppressive but dissolution not appropriate form of relief).

[33] Polikoff v. Dole & Clark Bldg. Corp., 37 Ill. App. 2d 29, 184 N.E.2d 792, 796 (App. Ct. 1962) (activities not oppressive, simply exercise of business judgment); Religious Press Ass'n v. Sunday School Times Co., 151 Pa. Super. 69, 29 A.2d 344, 347 (Super. Ct. 1942) (in view of improved financial condition during last fiscal year, current solvency, and potential financial support, 10 years of deficits did not constitute oppression); Tex-

The Mississippi Supreme Court, in *Capitol Toyota, Inc.,* has adopted by inference the definitions of oppressive conduct mentioned above.[34] Noting that involuntary dissolution is an extraordinary remedy to be employed sparingly upon the showing of exceptional factors, the court found that the requested remedy was inappropriate, but did not set forth what would constitute exceptional factors.[35] While the court declined to grant the requested dissolution, it did not allow the majority stockholders to deprive Gervin of his interest in the corporation without compensation. Looking to the terms of the contract, the court awarded Gervin twenty-five percent of the book value of Capitol Toyota's stock at the time of his discharge.[36]

Since the facts indicated that the corporation was a going concern operating at a profit,[37] the court properly concluded that involuntary dissolution was inappropriate. However, the court's failure to make a specific statement as to what constitutes "oppressive conduct," or what exceptional factors justify the imposition of the statutory remedy of dissolution leaves the practitioner somewhat at a loss. All that can be stated with certainty is that the termination of employment of a minority shareholder which results in his expectations being thwarted is not oppressive conduct. The court's action in fashioning a remedy to give the shareholder some benefit from his contract is in line with the practice of most jurisdictions which, when the involuntary dissolution remedy has been disallowed, have recognized that the complaining

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arkana College Bowl, Inc. v. Phillips, 408 S.W.2d 537, 539-40 (Tex. Civ. App. 1966) (acts consistent with honest exercise of business judgment are not oppressive).

For a further discussion of what constitutes oppressive conduct under a statute authorizing the dissolution of a corporation at the request of its minority shareholders, see Annot., 56 A.L.R.3d 358 (1974); Comment, *Oppression of Minority Shareholders: A Proposed Model and Suggested Remedies,* 47 MISS. L.J. 476, 477-94 (1976) (overview of oppression and proposed remedies).

[34] 381 So. 2d at 1039. The inference arises because the definitions are set forth in the various opinions cited as supporting the court's holding. *Id.*

[35] *Id.*

[36] *Id.* The plaintiff owned a 25% interest in the corporation conditioned on his employment by the corporation at the time of the retirement of a certain indebtedness. *Id.* at 1038. The court held that the condition was not an absolute requirement; thus, it did not negate the plaintiff's interest. To reach this conclusion, the court reasoned that the majority stockholders had the ability to retire the debt at any time, and, since the plaintiff's management was inadequate, contract principles should govern the fashioning of a remedy. *Id.* Gervin's mismanagement was sufficient reason to refuse to compel dissolution. However, since the contract provided that at the termination of Gervin's employment, the majority shareholders would acquire his stock at book value, this was deemed to be an adequate remedy. *Id.*

[37] *Id.* at 1038-39.

shareholder has been injured and is therefore entitled to some remedy.[38]

II. COMMERCIAL LAW

The court made no dramatic pronouncements in the area of commercial law during 1980, but there were several decisions of interest. One case[39] considered the formation of a contract by the conduct and writings of the parties. The court stated that where delivery had been accepted, and there was a signed receipt signifying delivery of a stated quantity, there was an enforceable contract of sale pursuant to section 75-2-201.[40] In another case,[41] the court dealt with the issue of whether a promisor had made a clear and convincing showing of fraud in the procurement of two deeds of trust and an assignment.[42] The court, affirming the lower court's finding, concluded that the promisor had not met her burden of proof.[43]

In *Wilson v. Planters Bank,*[44] a debtor renewed and consolidated two outstanding notes in a single demand instrument which was signed by his father as an accommodation endorser.[45] The bank filed suit against the father's estate, and the estate alleged as an affirmative defense that the instrument was unenforceable because of the absence of consideration in its execution.[46] After closely examining section 75-3-408[47] and the accompanying comment,[48] the court concluded that the

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[38] *See, e.g.,* Browning v. C & C Plywood Corp., 248 Or. 574, 434 P.2d 339, 343 (1967) (suggestion that cancellation of increase and restoration to former status may be more equitable). One jurisdiction has held that remedies are limited to those provided by statute. White v. Perkins, 213 Va. 129, 189 S.E.2d 315, 321 (1972). For a proposed model to guide courts in determining whether conduct is sufficiently oppressive to justify dissolution, see Comment, note 33 *supra,* at 488-500.

[39] Alabama Great S. R.R. v. McVay, 381 So. 2d 607 (Miss. 1980).

[40] *Id.* at 610-11. In addition, where no price is stated, the law provides that a reasonable price shall be supplied. *Id.* at 610 (citing MISS. CODE ANN. § 75-2-305(1) (1972)).

[41] Gulf Nat'l Bank v. Wallace, 394 So. 2d 864 (Miss. 1980).

[42] *Id.* at 864-65. The court noted the promisor was both a college graduate and a real estate salesperson. *Id.* at 866.

[43] *Id.* at 866-67.

[44] 383 So. 2d 1089 (Miss. 1980).

[45] *Id.* at 1089.

[46] *Id.* The executor also alleged the defense of mental incompetence, because the decedent suffered a distressing array of physical maladies. *Id.* The court, however, held that the decedent knew and understood what he was signing. *Id.* at 1090.

[47] MISS. CODE ANN. § 75-3-408 (1972) provides:

> Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305) [§ 75-3-305], *except that no consideration is necessary for an instrument or obligation thereon*

consideration supporting the original obligation supported not only the debtor's consolidation and renewal in a demand instrument but also the father's accommodation endorsement.[49] Therefore, the court found that the contract of the accommodation party was enforceable, and affirmed the trial court.[50] This case simply demonstrates the principle that consideration need not flow to the promisor in order for a negotiable instrument that is given in payment of an antecedent obligation to be enforceable against him.[51]

A. *Payee as holder in due course*

In *Dobbs-Maynard Co. v. Jumper,*[52] the court considered whether a payee may be a holder in due course of a negotiable instrument when the instrument in question is delivered to the payee by an intermediary or by an agent of the payee.[53] The payee corporation, Dobbs-May-

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> *given in payment of or as security for an antecedent obligation of any kind.* Nothing in this section shall be taken to displace any statute outside this code under which a promise is enforceable notwithstanding lack or failure of consideration. Partial failure of consideration is a defense pro tanto whether or not the failure is in an ascertained or liquidated amount.

(emphasis supplied).

[48] The comment provides: "The 'except' clause is intended to remove the difficulties which have arisen where a note or a draft, or an indorsement or either, is given as payment or as security for a debt already owed by the party giving it, or by a third person." U.C.C. § 3-408, Comment 2, *quoted in* Wilson v. Planters Bank, 383 So. 2d 1089, 1090 (1980).

[49] 383 So. 2d at 1090. *See* Blake v. Coates, 292 Ala. 351, 294 So. 2d 433, 435 (1974) (facts that no additional funds were advanced to debtor and that guarantor of renewal note received no benefits were held not to preclude existence of consideration for renewal notes); General Tire v. Solomon, 124 Ga. App. 308, 183 S.E.2d 573, 574 (Ct. App. 1971) (where notes were given in payment of antecedent obligation, defense of failure of consideration not available); Musulin v. Woodtek, 260 Or. 576, 491 P.2d 1173, 1175 (1971) (no new consideration required for note given in payment of antecedent debt); Castle & Co. v. Bagley, 24 Utah 2d 136, 467 P.2d 408, 409 (1970) (no consideration necessary to establish valid obligation between maker and payee). *Contra,* Capital City Bank v. Baker, 59 Tenn. App. 477, 442 S.W.2d 259, 265-66 (Ct. App. 1969) (renewal obligation must be supported by valuable consideration other than original obligation itself to be binding on party not an obligor upon original instrument).

[50] 383 So. 2d at 1090. Moreover, the court rejected the holding in First Am. Nat'l Bank v. Alcorn, Inc., 361 So. 2d 481 (Miss. 1978) and reaffirmed its earlier decision that § 75-3-408 displaced prior decisional law on the subject of consideration. 383 So. 2d at 1091 (citing First Nat'l Bank v. Carver, 375 So. 2d 1198, 1199 (Miss. 1979)).

[51] Consideration may flow to another, and may flow before the promise is made on the instrument. 383 So. 2d at 1090.

[52] 388 So. 2d 879 (Miss. 1980).

[53] *Id.* at 880-81.

nard, sought to recover the balance due on a promissory note that had been executed in the presence of Martinson, its agent, by the maker; the maker in turn set forth a number of affirmative defenses.[54] On appeal, Dobbs-Maynard claimed holder in due course status, and immunity from any defenses against the note on the part of the maker.[55]

Section 75-3-302[56] delineates the criteria necessary for a payee to qualify as a holder in due course. The payee must take the instrument for value, in good faith, and without notice that it is overdue or dishonored or that there is any defense against or claim to it on the part of any person.[57] Furthermore, a holder in due course takes an instrument for value when he accepts it as security for an antecedent claim whether or not the claim is due.[58] In *Dobbs-Maynard,* the court found that Martinson, who was the president, general manager, sole stockholder, and agent for the payee corporation, not only solicited the campaign advertising contract out of which the debt originated, but also induced the maker to execute a promissory note representing the balance due to the payee corporation.[59] Therefore, since the payee, through its agent, was fully cognizant of all the circumstances surrounding the making of the instrument, it was precluded from claiming holder in due course status and was subject to the affirmative defenses.[60]

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[54] *Id.* at 879-80. The defendant raised the following defenses: fraud and misrepresentation of fact through plaintiff's agent; lack or failure of consideration; conditional delivery or delivery for a special purpose; pre-existing agreement and condition precedent; and plaintiff not a holder in due course. *Id.* at 880.

[55] *Id.*

[56] MISS. CODE ANN. § 75-3-302(1) (1972). Mississippi has long recognized the holder in due course doctrine. Under the former statutes, the requirements for recognition of such status were analogous to those under the Uniform Commercial Code. Act of April 7, 1916, ch. 244, § 59, 1916 Miss. Laws 364 (repealed 1966), *construed in* Securities Inv. Co. v. Cohen, 241 Miss. 549, 555-56, 131 So. 2d 439, 442 (1961) (absence of bad faith or actual knowledge of an infirmity or defect in title); American Book Co. v. White System, 223 Miss. 510, 514, 78 So. 2d 582, 583 (1955) (instrument taken in good faith for full value without notice of defect); Wilson v. Stark, 146 Miss. 498, 502, 112 So. 390, 391 (1927) (complete instrument, regular on its face, taken in good faith for value before overdue and without notice of dishonor, and without notice of any defect or infirmity in title).

[57] MISS. CODE ANN. § 75-3-302(1) (1972).

[58] *Id.* § 75-3-303(b).

[59] 388 So. 2d at 881. The defendant testified that Martinson had assured him that the sole purpose of executing the note was to let Martinson borrow money on a bolstered financial statement. *Id.* at 880. Martinson handled all the business of the plaintiff in connection with defendant's campaign. *Id.* at 881.

[60] *Id.*

In reaching its conclusion, the tribunal discussed three cases from other jurisdictions that illustrate situations in which a payee may be deemed to be a holder in due course. Pursuant to a business arrangement, the defendant drawer in *S. & C. Transport Co. v. McAlister*[61] delivered signed checks to Pitts, who in turn completed the instruments in the amount of his purchases and tendered the checks in payment to the plaintiff.[62] There was no contact of consequence between the drawer and the payee, and no indication in the record that the payee was aware of the business arrangement between the drawer and Pitts.[63] Since delivery of the checks was accomplished by an intermediary, the Oklahoma court found that the payee was a holder in due course.[64]

In *Eldon's Super Fresh Stores, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,[65] the drawer sought recovery from the payee of a check wrongfully delivered by the drawer's agent to the payee in payment of the agent's personal debt.[66] The check reflected neither restrictions nor designations as to its intended use, and was delivered by the drawer's agent with the consent and knowledge of the drawer. Therefore, the court concluded that the payee took the check without notice of the drawer's claims and was entitled to the status of holder in due course.[67] In *Waterbury Savings Bank v. Jaroszerwski*,[68] the payee bank brought an action against defendants on a promissory note that was executed by defendants as part of a transaction with a corporation which subsequently discounted the note at the bank.[69] The fact that no agent or representative of the bank participated in the transaction that gave rise to the note, or was present at the time that the underlying documents were signed, led the court to determine that the bank was a holder in due course.[70]

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[61] 528 P.2d 1140 (Okla. 1974).

[62] *Id.* at 1141-42.

[63] *Id.*

[64] *Id.* at 1142-43.

[65] 296 Minn. 130, 207 N.W.2d 282 (1973).

[66] 207 N.W.2d at 284-85. There was a dispute as to whether the check was delivered to the agent in payment of services rendered by the agent or whether it was delivered to the agent to purchase stock from the payee. *Id.* at 285. The court, however, considered this dispute immaterial to the determination of holder in due course status. *Id.*

[67] *Id.* at 289. The court also noted that the check was delivered to the payee by the agent with the drawer's consent and that the payee had no trading account with, or indebtedness to, the drawer. *Id.*

[68] 4 Conn. Cir. 620, 238 A.2d 446 (Cir. Ct. 1967).

[69] 238 A.2d at 447-48. The defendant's answer pleaded that the note was signed as a result of a fraudulent representation by the corporation's employees that the note was merely a credit application. *Id.* at 448.

In each cited instance, the agent or intermediary effecting delivery of the negotiable instrument to the payee had a relationship with the *drawer* of the instrument. However, in the principal case, the intermediary delivering the promissory note to the payee was an agent of the *payee*. This was a significant factor in the court's holding.[71]

The agency rationale underlying the court's decision to deny holder in due course status to the Dobbs-Maynard Company is analogous to that utilized in at least one other jurisdiction. In *Mid-Continent National Bank v. Bank of Independence*,[72] the bank that issued a cashier's check brought an action against the negotiating bank, which had obtained payment for it upon presentment, to recover the balance due on that check. It had been purchased with a personal check that had been drawn against insufficient funds. The assistant cashier of the drawee bank had knowledge of the inadequacy of the account upon which the personal check had been drawn.[73] As the cashier was acting within the scope of her authority in her employment, her knowledge was imputed to the bank, thus defeating its assertion of holder in due course status.[74]

In the principal case, application of agency principles to resolve issues of notice and knowledge with respect to the payee's ability to assert holder in due course status was a practical solution to the problem. Since Martinson was, in reality, the corporation, then the imputation of his knowledge to the plaintiff corporation was the only proper course that the court could have followed to prevent a grave injustice to the defendant.

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[70] *Id.* at 448.

[71] 388 So. 2d at 881.

[72] 523 S.W.2d 569 (Mo. App. 1975).

[73] *Id.* at 570-72.

[74] *Id.* at 574-75. In other instances in which courts found the payee to have had full knowledge of the underlying transactions that brought about the execution of a negotiable instrument, the payee has been denied holder in due course status. *See, e.g.*, Coplan Pipe & Supply Co. v. Ben-Frieda Corp., 256 So. 2d 218, 221 (Fla. Dist. Ct. App. 1972) (holder in due course status denied where payee participated in underlying financing arrangement which gave rise to notes sued on); Mutual Home Dealers Corp. v. Alves, 23 A.D. 2d 791, 258 N.Y.S.2d 786, 788 (App. Div. 1965) (plaintiff's cognizance of pretended sale as cloak for usurious transaction prevented status of holder in due course); Oklahoma Nat'l Bank v. Equitable Credit Fin. Co., 489 P.2d 1331, 1334 (Okla. 1971) (where payee's depository bank knew payee was depositing check to cover other checks drawn for drawer's benefit, bank had reason to know of drawer's defense against payee and therefore was not a holder in due course).

B. Commercial Law Legislation

Chancery attachment statutes are important in the area of commercial law for jurisdictional purposes because they afford a means by which creditors may proceed against nonresident debtors who have effects within the state.[75] Attachment is a quasi in rem jurisdictional device involving real or personal property which is conceded to be the defendant's, but which the plaintiff wishes to apply to the satisfaction of a personal claim made against the defendant.[76] In 1980, the Mississippi State Legislature, in response to the federal district courts' rulings in *MPI, Inc. v. McCullough*[77] and *Mississippi Chemical Corp. v. Chemical Construction Corp.*,[78] amended the chancery attachment procedure to bring it into accord with constitutional dictates.[79] However, as an examination of the amendments will indicate, although the legislature corrected the procedural due process defects in the statutes, the amended procedure may still be unconstitutional in view of jurisdictional requirements set out in *Shaffer v. Heitner*[80] and *Rush v. Savchuk.*[81]

Under the former Mississippi statutes, a statement about the nature and object of the suit in the bill of complaint or the summons was a sufficient basis for attaching a defendant's property.[82] The complainant did not have to show an independent basis of equity,[83] post bond,[84] or make any showing that he was entitled to attachment.[85] Furthermore, the only ways in which the defendant could effect dissolution of the attachment were to post a satisfactory bond or to prevail at trial on the merits of the underlying claim.[86] The constitutionality of the former statutes was challenged in *Mississippi Chemical* and *MPI, Inc.* In *Mississippi Chemical,* the complainant utilized the state attachment procedure to attach substantial sums of money owed the defendant by certain corporations;[87] while in *MPI, Inc.*, the complainant executed a writ of attachment on the defendant's real property.[88] Using as a guide the fundamental principles of procedural due process set forth in a number of United States Supreme Court decisions,[89] the federal district courts held that the Mississippi attachment procedure was unconstitutional both facially and as applied because it allowed the deprivation of property without prior notice or an opportunity to be heard prior to seizure, and provided for no judicial supervision.[90] In *MPI, Inc.*, the court stated that *"any significant taking* of property contravenes the Due Process Clause if the State does it without prior notice and opportunity for hearing, absent some unusual or special circumstance which reasonably justifies an early post-seizure hearing on the validity of the seizure."[91]

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[75] *See* Miss. Code Ann. § 11-31-1 (1972) (chancery attachment statute).

[76] Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1958).

[77] 463 F. Supp. 887, 902 (N.D. Miss. 1978), *noted in* 50 Miss. L.J. 183 (1979).

[78] 444 F. Supp. 925, 928 (S.D. Miss. 1977).

[79] Miss. Code Ann. §§ 11-31-3, -5, -9 (Supp. 1980).

[80] 433 U.S. 186 (1977).

[81] 444 U.S. 320 (1980).

[82] Miss. Code Ann. § 11-31-3 (1972) (amended 1980).

[83] Statham v. New York Life Ins. Co., 45 Miss. 581, 592-93 (1871); Scruggs v. Blair, 44 Miss. 406, 411-12 (1870).

[84] I.B. Rowell & Co. v. Sandifer, 129 Miss. 167, 177, 91 So. 899, 901 (1922); Bonds v. Garvey, 87 Miss. 335, 336, 39 So. 492, 493 (1905). Bond was required of the complainant only if he sought to execute on a default judgment. Miss. Code Ann. § 11-31-11 (1972).

[85] Miss. Code Ann. § 11-31-3 (1972) (amended 1980).

[86] *Id.*

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[87] 444 F. Supp. at 928.

[88] 463 F. Supp. at 889.

[89] In a series of cases beginning with Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the United States Supreme Court determined that any taking of a significant property interest without prior notice or opportunity for a hearing violated the due process clause of the fourteenth amendment. *Id.* at 341-42. *E.g.,* North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601, 606-07 (1975) (prejudgment garnishment of defendant's bank account); Fuentes v. Shevin, 407 U.S. 67, 82-83 (1972) (prejudgment replevin laws declared unconstitutional; bond not sufficient safeguard); Goldberg v. Kelly, 397 U.S. 254, 267-68 (1970) (summary termination of welfare benefits). However, in Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), the Court upheld the constitutionality of Louisiana's sequestration statutes, which provided safeguards against the abuse of rights guaranteed by the due process clause. The statutes provided that the writ could issue only from a judge, and only after the creditor filed an affidavit which set forth facts that clearly established his right to sequestration. The creditor was also required to post sufficient bond, and the debtor was afforded an immediate hearing after seizure. *Id.* at 605-06. Similarly, in *Fuentes v. Shevin,* the court delineated "extraordinary situations" in which the postponement of notice and opportunity for hearing were justified. 407 U.S. at 90. The seizure must be necessary to secure an important governmental or public interest, and there must be a special need for prompt action. Further, the state must exercise strict control over the seizure; in other words, the person initiating the seizure must be a government official. *Id.* at 91.

For an in-depth discussion of procedural due process guidelines and the cases in which they are enumerated and developed, see generally Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution,* 59 VA. L. REV. 355 (1973); Moore, *Procedural Due Process in Quasi In Rem Actions after Shaffer v. Heitner,* 20 WM. & MARY L. REV. 157 (1978).

[90] 463 F. Supp. at 901; 444 F. Supp. at 942. In *MPI, Inc.*, the court concluded that the attachment of realty pursuant to the statutory scheme deprived the real estate owner of significant property interests, impaired the market value and marketability or mortgageability of the real estate, and placed an affirmative burden on the owner to take action to dissolve the attachment, all of which amounted to deprivation of property in violation of the due process clause of the fourteenth amendment. 463 F. Supp. at 901.

In amending the attachment statute, the Mississippi Legislature heeded the admonitions in *MPI, Inc.* and *Mississippi Chemical Corp.* The amended statute provides that the complainant must present to the chancellor a bill of complaint and an accompanying affidavit[92] which sets out the following: (a) that the action is an attachment in chancery brought against an absent, absconding or nonresident defendant debtor having effects within the state; (b) that certain facts and grounds exist which entitle the complainant to such an order; these include a statement of why the complainant's ability to recover may be endangered or impeded; (c) that the complainant seeks recovery of a stated amount; (d) that the claim has not been discharged in bankruptcy; (e) a description of the property to be attached; and (f) a list of persons known to have an interest in the property and the nature of their interest.[93] The chancellor is then to examine the documents and to issue the order of attachment if he finds: (a) that the complainant's ability to recover may be impaired or impeded; (b) that the affidavit establishes a prima facie case showing a right to recover on the claim; and (c) that the complainant has posted a sufficient bond.[94] In addition, upon issuance of the attachment order, the defendant is entitled to an immediate post-seizure hearing to seek dissolution[95] or, alternatively, the defendant may regain possession by posting a satisfactory bond.[96] If the chancellor determines that the procedure was not instituted in good faith, he may at his discretion award actual damages to the defendant.[97] Section 11-31-3 has been amended to require "that the order of attachment together with a copy of the bill of complaint and affidavit be served upon the persons possessing"[98] the effects of a nonresident, absent, or absconding debtor, or upon persons owing an indebtedness to such.[99] Further, the legislature eliminated the provision in section 11-31-9 which provided that "the lien of the creditor upon the property attached shall not be affected thereby unless security be given" by the defendant.[100] As amended, the Mississippi procedure tracks the constitutionally approved statutory scheme set forth in *Mitchell v. W. T. Grant Co.*[101]

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[91] 463 F. Supp. at 899 (court's emphasis).

[92] MISS. CODE ANN. § 11-31-2 (Supp. 1980).

[93] *Id.* § 11-31-2(1)(a)-(f).

[94] *Id.* § 11-31-2(2)(a)-(c).

[95] *Id.* § 11-31-2(3)(a). The appearance by the defendant at this hearing is a special appearance and not a general appearance for purposes of personal jurisdiction. *Id.*

[96] *Id.* § 11-31-2(3)(b). Bond must be in an amount equal to one hundred and twenty-five (125) percent of the value of the property attached or of the claim, whichever is less. *Id.*

[97] *Id.* § 11-31-2(3)(c). Damages include reasonable attorney's fees. *Id.*

[98] *Id.* § 11-31-3.

[99] *Id.* Moreover, § 11-31-5 provides that the sheriff or other like officer must levy the order of attachment of land. *Id.* § 11-31-5.

Chancery attachment is a quasi in rem jurisdictional device through which the court obtains power over a nonresident defendant. In *Shaffer v. Heitner*,[102] the United States Supreme Court concluded that a minimum contacts analysis is necessary to support the assertion of quasi in rem jurisdiction.[103] The analysis focuses on "the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of the States on which the rules of *Pennoyer* rests."[104] The Court noted that where the property attached does not relate to the cause of action, the property is simply a contact to be considered in deciding whether the minimum contacts standard has been met.[105] This caveat was reinforced in *Rush v. Savchuk*,[106] in which the Supreme Court stated: "We held in *Shaffer* that the mere presence of property in a State does not establish a sufficient relationship between the owner of the property and the State to support the exercise of jurisdiction over an unrelated cause of action."[107]

Although under the amended Mississippi scheme, instances will arise in which the property attached will not relate to the cause of action, the legislature has made no provision to insure that the language in *Shaffer* and *Rush* be given credence and effect. In order for the statutory scheme to withstand subsequent constitutional challenge, additional modifications must be made to ensure that the jurisdictional use of the procedure comports with the minimum contacts analysis and property relationship requirement as set out by the United States Supreme Court.[108]

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[100] *Compare id.* § 11-31-9 (1972) (amended 1980) (containing material quoted in text) *with id.* § 11-31-9 (1972) (Supp. 1980) (omitting quoted material). The Code still provides a bond-posting alternative for the defendant, *id.* § 11-31-2(3) (Supp. 1980), and requires the creditor to post bond prior to executing on a default judgment. *Id.* § 11-31-9.

[101] 416 U.S. 600, 604-20 (1974) (approving La. Civ. Code Ann. art. 3506-3510, 3571, 3574 (1961)).

[102] 433 U.S. 186 (1977).

[103] *Id.* at 204 (citing International Shoe Co. v. Washington, 326 U.S. 310 (1945)).

[104] 433 U.S. at 204.

[105] *Id.* at 207-09.

[106] 441 U.S. 320 (1980).

[107] *Id.* at 378.

[108] For an in-depth discussion of the status of quasi in rem jurisdiction after *Shaffer*, see Moore, *supra* note 89; Comment, *The Expanded Scope of the Sufficient Mini-*

C. *Unjustifiable Impairment Defense*

In *Huey v. Port Gibson Bank,*[109] the Mississippi Supreme Court considered whether a lender's failure to perfect properly its security interest in the maker's collateral constituted an unjustified impairment of collateral that discharged the liability of the personal endorser.[110] After the bankruptcy of the maker, the plaintiff bank filed suit against the endorser of two promissory notes for the balance due.[111] The endorser alleged as a defense that the bank had unjustifiably impaired the collateral to the extent that the endorser's recourse to it had been destroyed.[112] The trial court rejected the defense, denied the endorser's motion for a directed verdict, and entered judgment for the bank.[113] On appeal, the endorser argued that the bank had a duty to protect the endorser by perfecting its security interest in the collateral, and that its failure to do so resulted in impairment of the collateral and in discharge of the endorser's liability.[114] The endorser also contended that the value of the loss of collateral should be its market value.[115]

In order for a creditor to perfect a security interest in collateral and to have priority over other creditors, the creditor must file in the proper offices financing statements evidencing the security interest.[116] In *Huey,* the bank took a security interest in all inventory, appliances, and fixtures of the maker.[117] Because of the nature of the collateral, the bank, under section 75-9-401, was required to file financing state-

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mum Contacts Standard: Shaffer v. Heitner, 63 IOWA L. REV. 504 (1977); Note, *Civil Procedure—Jurisdiction—Quasi In Rem Jurisdiction and the International Shoe Minimum Contacts Doctrine,* 42 MO. L. REV. 435 (1977); Note, *The Applicability of Shaffer to Quasi In Rem Attachment of Foreigners' Assets,* 12 VAND. J. TRANSNAT'L L. 393 (1979).

[109] 390 So. 2d 1005 (Miss. 1980).

[110] *Id.* at 1007-08.

[111] *Id.* at 1007. The corporate maker declared bankruptcy. The bank, asserting its status as a secured creditor, submitted its claim to the trustee in bankruptcy. The trustee found that only $12,500 was secured with priority; the balance was considered to be unsecured and without priority. Therefore, the bank sought to hold the endorser personally liable on his endorsement. *Id.*

[112] *Id.* at 1008. The endorser's defense is set forth in MISS. CODE ANN. § 75-3-606(1)(b) (1972): "(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder . . . (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse."

[113] 390 So. 2d at 1006.

[114] *Id.* at 1008.

[115] *Id.* at 1009.

[116] MISS. CODE ANN. §§ 75-9-301, -302, -401 (1972).

[117] 390 So. 2d at 1008.

ments with the offices of both the secretary of state and the chancery clerk.[118] Since the bank failed to file with the secretary of state's office, its security interest was unperfected and without priority.[119] The supreme court concluded that the bank's failure to file with the secretary of state's office constituted unjust impairment of collateral and reversed the trial court's ruling on the directed verdict.[120] In addition, the court noted that the issue of whether there was an unjust impairment was properly a question for judicial determination,[121] although the extent to which the collateral was unjustly impaired was determined to be an issue for the jury to consider.[122] As to the determination of the amount of the endorser's discharge by the impairment, the court rejected the bank's argument that consideration should be given to the invoice price, the bankruptcy price and the market price.[123] Instead, the court decided that the measure of the value was the market value of the collateral.[124]

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[118] MISS. CODE ANN. § 75-9-401 (1972) provides in pertinent part:

> (1) The proper place to file in order to perfect a security interest is as follows:
>
> . . . .
>
> (b) when the collateral is goods which at the time the security interest attaches are or are to become fixtures, . . . , then in the office where a mortgage on the real estate concerned would be filed or recorded under the real estate laws of this state;
>
> . . .
>
> (c) in all other cases, in the office of the secretary of state and in addition, if the debtor has a place of business in only one (1) county of this state, also in the office of the chancery clerk of such county, or, if the debtor has no place of business in this state, but resides in the state, also in the office of the chancery clerk of the county in which he resides.

[119] 390 So. 2d at 1008.

[120] *Id.* at 1008-09. Earlier the court had refused to apply the filing requirement in Chrysler Credit Corp. v. Bank of Wiggins, 358 So. 2d 714 (Miss. 1978). Though the bank in *Chrysler Credit* failed to file a financing statement with the secretary of state, the court concluded that the third party creditor had actual knowledge of the bank's security interest, and was thus precluded from asserting the § 75-3-606(1)(b) defense. 358 So. 2d at 717.

In *Huey,* the court indicated that First Bank & Trust Co. v. Post, 10 Ill. App. 3d 127, 293 N.E.2d 907 (App. Ct. 1973), and Peoples Bank v. Pied Piper Retreat, Inc., 209 S.E.2d 573 (W. Va. 1974), were persuasive authority for the adoption of the filing requirement. In each case, the reviewing court found that the failure of the creditor to perfect properly its security interest in collateral, which resulted in a loss of priority, constituted an unjustifiable impairment of collateral, and discharged the secondary liability. 293 N.E.2d at 911; 209 S.E.2d at 577-78.

[121] 390 So. 2d at 1009.

[122] *Id.* at 1009-10.

[123] *Id.*

[124] *Id.* In addition, the court set forth the following guidelines for ascertaining the

The rule in *Huey* gives practitioners some insight into what constitutes unjustifiable impairment, and, with the specific definition of the measure of the value of the collateral, lends insight into the use and application of the unjustifiable impairment defense.

Colette Oldmixon

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amount of discharge:

> Any discharge under subsection (1) of Section 3-606 is available only "to the extent" that the conduct affects the accommodation party's obligation. This can be fairly readily determined where the conduct affects collateral. The question is, what was the collateral worth of which the accommodation party was deprived or as to which his rights were otherwise diminished? If a holder releases or otherwise impairs the collateral so that it is no longer available to satisfy all or part of the obligation of the principal debtor, its value must be determined as of that time and subtracted from the accommodation party's obligation. He remains liable for that part of the debt due which is not adversely affected. If the value equalled or exceeded the debt, the discharge is total.

Id. (quoting 2 BENDER'S UNIFORM COMMERCIAL CODE SERVICE § 13.24(4) at 13-69 (1976)).

CRIMINAL LAW AND PROCEDURE

The Mississippi Supreme Court handed down over ninety decisions in the criminal law and procedure area in 1980. This commentary will address two major areas: criminal procedure and evidence.

Cases not warranting textual treatment were decisions involving probable cause,[1] search and seizure,[2] indictments,[3] notice requirements,[4] jury questions,[5] co-indictee problems,[6] pleas,[7] evidence,[8] testimony,[9] interpretation of various statutes,[10] peremptory instructions

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[1] Conway v. State, 397 So. 2d 1095, 1097 (Miss. 1980) (where law enforcement officer has time to obtain an arrest warrant but does not do so, an arrest supported by probable cause will still be valid); Smith v. State, 386 So. 2d 1117, 1119 (Miss. 1980) (test for probable cause for arrest is whether a reasonable man, considering all facts and circumstances existing at time of arrest, would be warranted in believing offense had been committed); Washington v. State, 382 So. 2d 1086, 1087-88 (Miss. 1980) (allegations of probable cause must be supported by a statement of underlying facts or circumstances; good faith alone is not enough).

[2] Conway v. State, 397 So. 2d 1095, 1098 (Miss. 1980) (evidence in plain view may be seized without warrant incident to valid arrest or search of automobile stopped on probable cause); Fields v. State, 382 So. 2d 1098, 1101 (Miss. 1980) (evidence obtained from vacuuming impounded car without warrant not admissible under automobile exception); Lucas v. State, 381 So. 2d 140, 144 (Miss. 1980) (where private citizen conducts search and police subsequently view products of search, police view is not a search within fourth amendment).

[3] Norman v. State, 385 So. 2d 1298, 1301 (Miss. 1980) (indictment sufficient when by fair construction of the language accused is given enough notice to be able to prepare appropriate defense); Jones v. State, 383 So. 2d 498, 500 (Miss. 1980) (indictment of prior felon for carrying deadly weapon not invalid for failure to state judicial district of prior conviction or for omission that weapon was "concealed"); Shurgio v. State, 379 So. 2d 534, 537 (Miss. 1980) (where no variance between original indictment and proof, indictment remains valid despite failed amendment).

[4] Moss v. State, 386 So. 2d 1129, 1131-32 (Miss. 1980) (circuit court rule providing for notice to each side of witnesses to be called applies only where defendant interposes alibi defense); Lee v. State, 383 So. 2d 821, 822-23 (Miss. 1980) (failure to provide defense counsel with copy of defendant's inculpatory statements not error where district attorney had no knowledge of it at granting of discovery order and no prejudice resulted); Kimbrough v. State, 379 So. 2d 934, 935-36 (Miss. 1980) (not error where defense counsel received less than 24 hours notice of lineup but attended lineup).

[5] Reddix v. State, 381 So. 2d 999, 1009 (Miss. 1980) (use of same jury for determination of guilt and sentencing permitted but not required by MISS. CODE ANN. § 99-19-101(1) (Supp. 1979)); Jones v. State, 381 So. 2d 983, 991-92 (Miss. 1980) (jurors opposed to the death penalty may be excused for cause); Craft v. State, 380 So. 2d 251, 255 (Miss. 1980) (where defendant requested special venire resulting in only four of 19 prospective jurors being black, court's denial of motion to quash on grounds of racial bias was proper in absence of purposeful or historical discrimination).

[6] Fulgham v. State, 386 So. 2d 1099, 1100 (Miss. 1980) (reversible error for court to

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sentence a guilty pleading co-indictee in presence of defendant's jury); Terry v. State, 384 So. 2d 76, 79-80 (Miss. 1980) (where state's evidence against co-defendants is identical, trial judge could properly refuse severance).

[7] Williamson v. State, 388 So. 2d 168, 170 (Miss. 1980) (when defendant continues to assert his innocence, refusing to accept guilty plea is within trial court's discretion); Salter v. State, 387 So. 2d 81, 83-84 (Miss. 1980) (state still bound by plea bargain agreement where defendant unsuccessfully attempts to vacate it; if guilty plea successfully vacated state no longer bound by agreement); Harris v. State, 386 So. 2d 393, 396 (Miss. 1980) (when person knows right from wrong while sober, he is responsible for acts committed while intoxicated); Wadford v. State, 385 So. 2d 951, 955 (Miss. 1980) (evidence sufficient to find justifiable homicide must be produced to support plea of self-defense); Norman v. State, 381 So. 2d 1024, 1029 (Miss. 1980) (if co-conspirator acts in furtherance of conspiracy within two years prior to defendant's indictment, statute of limitations has not run on defendant since the act of one co-conspirator is the act of all); Anderson v. State, 381 So. 2d 1019, 1022-23 (Miss. 1980) (defense of insanity opens defendant's background to questions concerning mental competency); Torrence v. State, 380 So. 2d 248, 249 (Miss. 1980) (entrapment established as matter of law where defendant's uncontradicted testimony establishes that police informer supplied the narcotics on which charge based); Lavender v. State, 378 So. 2d 656, 658 (Miss. 1980) (trial court must give sufficient time for psychiatric examination where reasonable probability exists that defendant is incapable of making rational defense).

[8] McClendon v. State, 387 So. 2d 112, 115 (Miss. 1980) (defendant's falsification of identification to avoid arrest admissible as evidence of guilt); Jefferson v. State, 386 So. 2d 200, 202 (Miss. 1980) (where prior crimes of defendant were first brought out by defendant's counsel, no error in its admission or further development by state); Norman v. State, 385 So. 2d 1298, 1301 (Miss. 1980) (specific instances of prior bad conduct may be introduced to show motive); Terry v. State, 384 So. 2d 76, 79-80 (Miss. 1980) (inconsistent statements relevant to crime charged admissible for purposes other than impeachment); Reddix v. State, 381 So. 2d 999, 1009 (Miss. 1980) (defendant may not assert as error admission of testimony relating to matters he first injects into record); Jones v. State, 381 So. 2d 983, 990-91 (Miss. 1980) (admission of evidence of conviction of accomplice prohibited, but defendant may not complain if he introduces and attempts to use it); Gonzales v. State, 381 So. 2d 176, 178 (Miss. 1980) (when evidence tending to show premeditation was admitted in murder prosecution and charge was reduced to manslaughter following state's case in chief, defendant may not raise its admissibility for first time on appeal); Lucas v. State, 381 So. 2d 140, 143 (Miss. 1980) (where objection to introduction of evidence made on specific grounds at trial, all other grounds waived on appeal); Hammock v. State, 379 So. 2d 323, 327 (Miss. 1980) (competency, relevancy, and materiality of photographs in homicide cases within trial court's discretion); Coley v. State, 378 So. 2d 1095, 1096-97 (Miss. 1980) (evidence of previous marital difficulties admissible in trial for murder of third party to show intent or motive).

[9] Broadus v. State, 392 So. 2d 203, 205 (Miss. 1980) (convictions of witness may be shown for impeachment purposes regardless of age of witness at time of conviction); Morgan v. State, 388 So. 2d 495, 498 (Miss. 1980) (neither party may comment before jury on failure of other party to examine witness equally accessible to both); Coleman v. State, 388 So. 2d 157, 159 (Miss. 1980) (error to refuse to allow defendant to question another person involved in offense so that jury can hear answers or claim of fifth amendment rights); Ramon v. State, 387 So. 2d 745, 750 (Miss. 1980) (nurse's testimony does

and directed verdicts,[11] instructions,[12] jury verdicts,[13] sentencing,[14] mo-

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not come under privileged communication statute unless nurse was agent of attending physician and her presence was in connection with treatment by physician at time medical information was received); Neal v. State, 386 So. 2d 718, 720 (Miss. 1980) (testimony by embalmer-funeral director regarding cause of death sufficient, but testimony of medical doctor preferred); Terry v. State, 384 So. 2d 76, 80 (Miss. 1980) (harmless error for state to question defendant about conversation between defendant and his attorney when defendant denied that his attorney instructed him to testify to certain information and state pursued matter no further); Ray v. State, 381 So. 2d 1032, 1036 (Miss. 1980) (admission of prior convictions of deceased as evidence of bad reputation prohibited); Lucas v. State, 381 So. 2d 140, 144 (Miss. 1980) (jury allowed to question witness only when a juror indicates he needs clarification of material issue); Wall v. State, 379 So. 2d 529, 531 (Miss. 1980) (uncorroborated testimony of accomplice sufficient to convict defendant, but should be viewed with great caution and suspicion); Parker v. State, 378 So. 2d 662, 663 (Miss. 1980) (since testimony of accomplice was self-contradictory, it was unworthy of credibility and could not support conviction; improper for district attorney to attempt to impeach witness for state by use of unsigned statement without first laying proper predicate).

[10] Miller v. State, 390 So. 2d 592, 594 (Miss. 1980) (where invasion is without force, one cannot defend his property by killing aggressor unless it is his habitation); *In re* Jordan, 390 So. 2d 584, 587 (Miss. 1980) (pre-sentence investigation for felony convictions required by MISS. CODE ANN. § 47-7-9 (Supp. 1980) does not apply to cases involving death penalty since sentencing phase of bifurcated trial involves same information); Gray v. State, 389 So. 2d 1384, 1386 (Miss. 1980) (words "purposely, recklessly or knowingly" in aggravated assault statute, MISS. CODE ANN. § 97-3-7 (Supp. 1980), apply only where defendant has actually caused serious bodily harm); Cooper v. State, 386 So. 2d 1115, 1116 (Miss. 1980) (conviction of armed robbery under MISS. CODE ANN. § 97-3-79 (Supp. 1980) does not require actual taking or asportation of property); Carter v. State, 386 So. 2d 1102, 1106 (Miss. 1980) (there must be actual detriment or injury to victim to sustain conviction for false pretense under MISS. CODE ANN. § 97-19-39 (1972)); Jefferson v. State, 386 So. 2d 200, 203 (Miss. 1980) (indictment under MISS. CODE ANN. § 97-17-23 (1972) charging defendant with breaking and entering victim's dwelling house in nighttime with intent to commit rape, armed with deadly weapon, not defective by charging two separate and distinct crimes in that charge of rape is "intended crime" under statute); Anderson v. State, 381 So. 2d 1019, 1022 (Miss. 1980) (not necessary to prove actual force in prosecution for rape of mentally incompetent person); Reddix v. State, 381 So. 2d 999, 1009-10 (Miss. 1980) (under MISS. CODE ANN. § 99-19-101(5)(b) (Supp. 1980), word "previously" means prior to sentencing in capital case and not prior to commission of capital offense); Jones v. State, 381 So. 2d 983, 989, 992 (Miss. 1980) (Mississippi's death penalty statute not unconstitutionally vague; when defendant tried for capital murder, it is sufficient to show he was a willing participant in the felony, and not necessary to prove he, rather than his co-felon, actually caused the death); Harrigill v. State, 381 So. 2d 619, 621 (Miss.) (conspiracy does not merge with offense contemplated by conspirators and is complete offense in itself), *cert. denied*, 446 U.S. 939 (1980); Phillips v. State, 379 So. 2d 318, 320 (Miss. 1980) (conviction of involuntary manslaughter by culpable negligence under MISS. CODE ANN. § 97-3-47 (1972) must be based on negligence so gross as to evince wanton disregard of or utter indifference to safety of human life).

[11] Wright v. State, 387 So. 2d 735, 736 (Miss. 1980) (where evidence sufficient to support verdict, peremptory instructions should be refused); Moss v. State, 386 So. 2d

tions for mistrial,[15] retrial,[16] competence of counsel,[17] and bills of

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1129, 1131 (Miss. 1980) (defendant accused of murder whose only plea is self-defense not entitled to peremptory instruction by virtue of *Weathersby* rule where his trial testimony is refuted by physical facts, pathologist's testimony, and defendant's own written statement); Terry v. State, 384 So. 2d 76, 80 (Miss. 1980) (where testimony of state and of defendant in conflict, it is for jury to decide); Jones v. State, 383 So. 2d 498, 500 (Miss. 1980) (where defendant made no effort to overcome prima facie case made out by state under MISS. CODE ANN. § 97-37-5 (1972), trial court did not err in refusing to grant defendant directed verdict and peremptory instruction of not guilty); Grace v. State, 379 So. 2d 540, 542 (Miss. 1980) (peremptory instruction requested by defendant on belief he was entitled to benefit of *Weathersby* rule properly refused when contradictory testimony introduced); Lucas v. State, 381 So. 2d 140, 144 (Miss. 1980) (motion for directed verdict waived by presenting evidence in defendant's own behalf after court ruled adversely on motion).

[12] Broadus v. State, 392 So. 2d 203, 204 (Miss. 1980) (defendant tried for sale or delivery of marijuana is entitled to an instruction on his defense of lack of knowledge since knowledge that the substance was a controlled substance is an essential element of the offense); *In re* Jordan, 390 So. 2d 584, 585 (Miss. 1980) (instruction telling jury that it may find defendant guilty of lesser offense must be justified by evidence); Parcell v. State, 389 So. 2d 1386, 1389 (Miss. 1980) (where the manslaughter theory has been amply presented to the jury, the defendant is not entitled to a further instruction on same); Gray v. State, 387 So. 2d 101, 104 (Miss. 1980) (conviction will not be reversed unless delay prejudicial where instruction not filed at least 24 hours before trial as required); Norman v. State, 385 So. 2d 1298, 1303 (Miss. 1980) (failure to give proposed instructions not reversible error if actual instructions, read as a whole, fairly state law of case); Jackson v. State, 381 So. 2d 1040, 1042 (Miss. 1980) (defendant cannot complain of instruction more favorable to him than law required); Ray v. State, 381 So. 2d 1032, 1034 (Miss. 1980) (defendant indicted for murder and convicted of manslaughter may not complain of murder instruction); Norman v. State, 381 So. 2d 1024, 1029 (Miss. 1980) (trial court's refusal to grant instruction stating drug addiction as defense was not error since there was no evidence that defendant was unable to form the requisite intent); Jones v. State, 381 So. 2d 983, 992 (Miss. 1980) (failure to instruct that a life sentence would be imposed if there was not a unanimous jury verdict was not reversible error where unanimous verdict was reached in reasonable time); Griffin v. State, 381 So. 2d 155, 157 (Miss. 1980) (where state's instruction places greater burden on state than required, defendant may not complain); Nettles v. State, 380 So. 2d 246, 247 (Miss. 1980) (trial judge's failure to give instruction on his own motion not error, unless, considering the totality of the circumstances, failure to instruct would deprive the defendant of a constitutionally fair trial); Grace v. State, 379 So. 2d 540, 542 (Miss. 1980) (granting of state's manslaughter instruction not reversible error where evidence justifies murder conviction and defendant convicted of manslaughter); Hammock v. State, 379 So. 2d 323, 328 (Miss. 1980) (manslaughter instruction in murder case not justified where there is no evidence that killing was without deliberation or malice).

[13] Lee v. State, 383 So. 2d 821, 823 (Miss. 1980) (reopening case already submitted to jury in trial court's discretion); Griffin v. State, 381 So. 2d 155, 157-58 (Miss. 1980) (verdict finding defendant "guilty of rape" rather than "guilty as charged" in indictment was responsive to charge since "forcibly ravish," as used in indictment, is synonymous with "rape").

[14] *In re* Jordan, 390 So. 2d 584, 585-86 (Miss. 1980) (standards of Jackson v. State,

exceptions.[18]

I. Criminal Procedure

For purposes of this commentary, the criminal procedure area will be divided into seven sections: bad checks, right to carry a weapon, right to speedy trial, defendant's presence at crucial stages in the trial, jury instructions on competency of witnesses, the habitual criminal statutes, and miscellaneous decisions.

A. *Bad Checks*

At common law, a person could not be prosecuted for obtaining goods by the use of a check drawn on a bank with which he had no credit.[19] The common law, however, has been abrogated by every state

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337 So. 2d 1242 (Miss. 1976), provide sufficient safeguards concerning aggravating and mitigating circumstances in bifurcated trials); Baugh v. State, 388 So. 2d 141, 142 (Miss. 1980) (identification of deceased by circumstantial evidence together with other evidence held sufficient to support murder conviction); Cherry v. State, 386 So. 2d 203, 204-05 (Miss. 1980) (defendant's possession conviction against weight of evidence where witness testifies marijuana was his and testimony corroborated); Reddix v. State, 381 So. 2d 999, 1004 (Miss. 1980) (evidence of mitigating circumstances may be introduced in sentencing phase of capital murder case if reasonably relevant); Bell v. Watkins, 381 So. 2d 118, 119-20 (Miss. 1980) (overruled defendant's motion for leave to file petition for writ of error coram nobis and/or writ of habeas corpus since defendant received fair trial with adequate representation and sentence was supported by evidence); Kimbrough v. State, 379 So. 2d 934, 935 (Miss. 1980) (victim's identification of defendant, coupled with other evidence, sufficient to support jury's verdict though victim referred to defendant by wrong name).

[15] Coley v. State, 378 So. 2d 1095, 1097 (Miss. 1980) (within trial court's discretion to overrule defendant's motion for mistrial where court previously sustained his objection to improper question).

[16] McClendon v. State, 387 So. 2d 112, 114-15 (Miss. 1980) (second trial after motion for mistrial granted did not subject defendant to double jeopardy and refusal to supply free transcript of first trial not prejudicial); Brown v. State, 382 So. 2d 1089, 1090 (Miss. 1980) (defendant entitled to retrial where court reporter's notes lost and passage of time makes reconstruction of testimony impossible).

[17] Hill v. State, 388 So. 2d 143, 144 (Miss. 1980) (determinative question to charge of attorney incompetency is whether attorney's inaction failed to provide defendant with reasonably effective assistance); Harris v. State, 386 So. 2d 393, 395 (Miss. 1980) (finding no abuse of judicial discretion in overruling counsel's motion to withdraw based on conflict of interest where defendant's rights sufficiently protected).

[18] Coley v. State, 378 So. 2d 1095, 1097 (Miss. 1980) (bill of exceptions not in compliance with statutory requirements will not be considered by supreme court).

[19] Broadus v. State, 205 Miss. 147, 147-48, 38 So. 2d 692, 692-93 (1949). *See generally* Sanders, *The Work of the Mississippi Supreme Court, Part II: Criminal Law and Procedure,* 21 Miss. L.J. 10, 15 (1949).

in the United States through statutes covering bad checks.[20] Mississippi's first bad check law was codified at sections 897 and 898 of the 1917 Code.[21] These sections made it a crime for a person to make, draw, utter, or deliver a check to obtain credit, money, goods, or other property of value without sufficient funds with which to pay the check.[22] If the drawer of the check made payment within ten days of receipt of written notice, prosecution was terminated.[23] In 1932, the Mississippi Supreme Court, in *State v. Johnson*,[24] held that these statutes violated the Mississippi Constitution[25] because they were, in effect, an enforcement of debt collections through the use of criminal processes.[26] The Mississippi Legislature subsequently remedied the defects found by the court in *Johnson* by adding the requirement of intent to defraud and omitting the termination of prosecution if the check was paid within ten days.[27]

In 1972, the legislature enacted a new bad check statute which includes within its purview checks given to obtain money, any article of value, or services except pre-existing debts.[28] The new statute also requires that the drawer or maker know that he did not have sufficient funds to cover the check.[29]

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[20] *E.g.*, ALA. CODE § 13A-9-13 (1977); GA. CODE ANN. § 26-1704 (Supp. 1980); IND. CODE ANN. § 35-43-5-5 (Burns 1979); LA. REV. STAT. ANN. § 14:71 (West 1974); ME. REV. STAT. ANN. tit. 17-A, § 708 (Special Pamphlet 1979); MINN. STAT. ANN. § 609.535 (Supp. 1980); N.Y. PENAL LAW § 190.05 (McKinney 1975); R.I. GEN. LAWS §§ 19-19-2, -3 (Supp. 1979); VT. STAT. ANN. tit. 9, § 2311 (Supp. 1979) and tit. 13, § 2022 (1974); WIS. STAT. ANN. § 403.806 (West Supp. 1980); WYO. STAT. § 6-3-123 (Supp. 1980). *See* notes 46 & 62 *infra* for the other states.

[21] MISS. CODE ANN. §§ 897, 898 (1917) (Hemingway). These sections were later replaced by MISS. CODE ANN. §§ 923, 924 (1930).

[22] *See* MISS. CODE ANN. § 923 (1930) (passing bad check in amount less than $25 is misdemeanor; over $25 is felony).

[23] *See id.* § 924 (payment included all fees, interest and damages).

[24] 163 Miss. 521, 141 So. 338 (1932).

[25] MISS. CONST. art. 3, § 30 (1890) states: "There shall be no imprisonment for debt."

[26] 163 Miss. at 535, 141 So. at 342. For a general discussion of the constitutionality of bad check statutes, see Annot., 23 A.L.R. 459 (1923) and Annot., 76 A.L.R. 1229 (1932).

[27] Act of May 18, 1932, ch. 299, § 1, 1932 Miss. Laws 635 (current version at MISS. CODE ANN. § 97-19-55 (Supp. 1980)).

[28] Act of May 8, 1972, ch. 476, § 1, 1972 Miss. Laws 615 (codified at MISS. CODE ANN. § 97-19-55 (Supp. 1980)).

[29] MISS. CODE ANN. § 97-19-55 (Supp. 1980) provides:

> It shall be unlawful for any person with fraudulent intent to make, draw, issue, utter or deliver any check, draft or order for the payment of money drawn on any bank, corporation, firm or person for the purpose of obtaining money, or

In 1980, the Mississippi Supreme Court had the opportunity to address the services provision of the present bad check statute in *Hindman v. State.*[30] Hindman had agreed to pay Denson $300.00 to emcee a bridal show. After Denson had completed the show, Hindman gave her a check which was subsequently dishonored because Hindman had insufficient funds to cover the check. Upon conviction, Hindman was fined $1000.00 and sentenced to three years imprisonment.[31] The supreme court reversed Hindman's conviction since the service was not rendered in reliance on the check. The court further held that the check was given in payment of a pre-existing debt because the service was completed before the check was given.[32]

Earlier Mississippi cases, although decided under the former bad check statutes, support the court's decision. The supreme court has held repeatedly that the maker or drawer must receive something of value at the time the check is given.[33] Two 1949 cases illustrate this analysis. In *Broadus v. State,*[34] the defendant Broadus sent his agent to secure some machinery from Fowler. After the agent left with the machinery, Broadus appeared and gave Fowler a bad check.[35] Since there was no present exchange for the check, the court concluded that Broadus had not violated the bad check statute.[36] In *Blakeney v. State,*[37] the defendant hired Bender to saw logs and blocks and, after

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> any article of value, or to obtain services except payment or payments on past due accounts, knowing at the time of making, drawing, issuing, uttering or delivering said check, draft or order that the maker or drawer, has not sufficient funds in, or on deposit with, such bank, corporation, firm or person, for the payment of such check, draft, or order in full, and all other checks, drafts or orders upon such funds then outstanding.

[30] 378 So. 2d 663 (Miss. 1980).

[31] *Id.* at 664.

[32] *Id.* at 665.

[33] *See, e.g.,* Pollard v. State, 244 So. 2d 729, 730 (Miss. 1971) (receiving value for check at time it is delivered is indispensable element of offense); Kitchens v. Barlow, 250 Miss. 121, 137, 164 So. 2d 745, 751 (1964) (check must be given in exchange for property); Grenada Coca Cola Co. v. Davis, 168 Miss. 826, 832, 151 So. 743, 744 (1934) (prosecution where check is issued for goods already delivered is malicious). *But see* Moore v. State, 205 Miss. 151, 162-63, 38 So. 2d 693, 695 (1949) (where five minutes elapsed between delivery of goods and issuance of check, this constituted a single transaction and bad check law applied). *See also* Note, *Value and Consideration for Checks,* 78 Banking L.J. 921, 922 (1961) ("when the check is delivered to the payee without consideration, it is in his hands a mere naked promise unenforceable in law").

[34] 205 Miss. 147, 38 So. 2d 692 (1949).

[35] *Id.* at 149, 38 So. 2d at 692.

[36] *Id.* at 150-51, 38 So. 2d at 693.

[37] 206 Miss. 85, 39 So. 2d 767 (1949).

the work was completed, paid for the services with a bad check.[38] The supreme court reversed Blakeney's conviction under the bad check statute since Bender's service was not rendered in reliance on the check.[39] The supreme court applied the same analysis in 1965 in *Jackson v. State.*[40] In that case Jackson delivered a bad check for a house and some outbuildings which he was removing.[41] The court upheld Jackson's conviction because the evidence indicated the house was removed after the check was given; therefore, there was reliance on the check.[42]

One problem with the *Hindman* decision is that the court ignored the fact that although there can be a simultaneous exchange of goods and a check, it is impossible to have a simultaneous exchange of services and a check. It is evident from *Hindman* that a conviction cannot be obtained where a check is given subsequent to a service. The *Hindman* and *Blakeney* decisions indicate, however, that a bad check given prior to the rendering of services falls within the ambit of section 97-19-55.[43] Therefore, to be protected by the statute, a person rendering services must inquire into the means of payment before rendering the services and must receive the check before performing any work. As Justice Bowling pointed out in his dissenting opinion in *Hindman,* this could result in very untenable business situations.[44] Thus, only rarely will a person be prosecuted under the services provision of the present bad check statute. Justice Bowling was correct in concluding that the majority opinion has, in effect, declared the services provision of the statute unconstitutional.[45]

A review of cases from other jurisdictions reveals that the Mississippi Supreme Court's holding is not inconsistent with those of other states. Sixteen states have statutes that are similar to Mississippi's, and which provide for criminal sanctions for bad checks given for services.[46] Courts in four of these states have addressed the services provisions of their bad check statutes.

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[38] *Id.* at 86, 39 So. 2d at 767.

[39] *Id.* at 86-87, 39 So. 2d at 767-68. It should be noted that the court did not cite this case in its opinion in *Hindman.*

[40] 251 Miss. 529, 170 So. 2d 438 (1965).

[41] *Id.* at 531-32, 170 So. 2d at 439.

[42] There was conflicting evidence on this point and on the reason the check was given. The court held that this was a jury question, and there was sufficient evidence to uphold the verdict. *Id.* at 532-33, 170 So. 2d at 440.

[43] *See* note 29 *supra.*

[44] 378 So. 2d at 666.

[45] *Id.*

[46] ARK. STAT. ANN. § 67-721 (1980); COLO. REV. STAT. § 18-5-205(2) (1973); FLA. STAT. ANN. § 832.05(4)(a) (West Supp. 1980); ILL. ANN. STAT. ch. 38, § 17-1(B) (Smith-

The Florida Supreme Court in *Helms v. State,*[47] held that a contractor who issued bad checks to a carpenter and a painter for services rendered could not be convicted of a felony under the Florida bad check statute[48] because the check was not the inducement for the performance of the services.[49] In *Sinclair v. State,*[50] the Maryland Court of Special Appeals similarly held that the issuance of a check as final payment after services were performed and merchandise was delivered did not constitute a crime under the Maryland bad check statute[51]

Hurd Supp. 1980-81); Iowa Code Ann. § 714.1 (West Supp. 1980-81); Ky. Rev. Stat. Ann. § 514.090 (Baldwin 1978); Md. Ann. Code art. 27, § 141 (Supp. 1980); Mass. Gen. Laws Ann. ch. 266, § 37 (West 1970); Mont. Rev. Codes Ann. § 45-6-316 (1979); N.M. Stat. Ann. §§ 30-36-2, -4 (1980 Replacement Pamphlet 51); S.C. Code § 34-11-60 (Supp. 1979); Tenn. Code Ann. § 39-1959 (Supp. 1980); Tex. Penal Code Ann. tit. 7, §§ 31.04 (Vernon Supp. 1981) & 31.06 (Vernon 1974); Utah Code Ann. § 76-6-505 (1978 replacement edition); Va. Code § 18.2-181 (Supp. 1980); W. Va. Code § 61-3-39 (Supp. 1980).

[47] 128 So. 2d 756 (Fla. 1961).

[48] Fla. Stat. Ann. § 832.05(4)(a) (West Supp. 1981) provides:

> It shall be unlawful for any person, firm or corporation to obtain any services, goods, wares or other things of value by means of a check, draft or other written order upon any bank, person, firm or corporation, knowing at the time of the making, drawing, uttering, issuing or delivering of said check or draft that the maker thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation, provided however that no crime may be charged in respect to the giving of any such check or draft or other written order where the payee knows or has been expressly notified or has reason to believe that the drawer did not have on deposit or to his credit with the drawee sufficient funds to insure payment thereof.

[49] 128 So. 2d at 758. The Florida legislature, however, provided criminal sanctions for a drawer issuing checks knowing that there were insufficient funds under Fla. Stat. Ann. § 837.05(2) (1961). Violation of this provision was a misdemeanor under Fla. Stat. Ann. § 811.021(3) (1961).

[50] 21 Md. App. 477, 319 A.2d 549 (Ct. Spec. App. 1974), *aff'd*, 337 A.2d 703 (1975).

[51] Md. Ann. Code art. 27, § 141 (Supp. 1980) provides:

> A person is guilty of obtaining property or services by a bad check when:
>
> (a)(1) As a drawer or representative drawer, he obtains property or services by uttering a check knowing that he or his principal, as the case may be, has insufficient funds with the drawee to cover it and other outstanding checks; and
>
> (2) He intends or believes at the time of utterance that payment will be refused by the drawee upon presentation; and
>
> (3) Payment is refused by the drawee upon presentation.
>
> (b)(1) He obtains property or services by passing a check knowing that the drawer thereof has insufficient funds with the drawee to cover it and other outstanding checks; and
>
> (2) He intends or believes at the time the check is passed that payment

since the services were not supplied in reliance on the check.[52] The Texas Court of Criminal Appeals reached the same conclusion in *Cortez v. State.*[53] In *Cortez* the payee of the bad check had tinted some office windows and upon completion of the work was given a bad check. The check did not affect the payee's judgment since it was given after the service was completed,[54] and the Texas statute[55] requires deception *before* the service is rendered. The only state court holding to the contrary is the Utah Supreme Court. In *State v. Pfannenstiel*[56] the drawer issued a bad check in payment for car repairs. The court held

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> will be refused by the drawee upon presentation; and
>
> (3) Payment is refused by the drawee upon presentation.
>
> (c) As a drawer or representative drawer, he obtains property or services by uttering a check knowing that he or his principal, as the case may be, at the time of uttering the check intends, without the consent of the payee, to stop or countermand the payment of the check, or otherwise to cause the drawee to disregard or dishonor or refuse to recognize the check, and payment is refused by the drawee upon presentation.
>
> (d) He obtains property or services by passing a check knowing that payment of the check has been stopped or countermanded, or the drawee of the check will disregard or dishonor or refuse to recognize the check, and payment is refused by the drawee upon presentation.

[52] 319 A.2d at 552-53 (both goods and services provided).

[53] 582 S.W.2d 119 (Tex. Crim. App. 1979).

[54] *Id.* at 121.

[55] TEX. PENAL CODE ANN. tit. 7, § 31.04 (Vernon Supp. 1980) states in pertinent part: "(a) A person commits theft of service if, with intent to avoid payment for service that he knows is provided only for compensation: (1) he intentionally or knowingly secures performance of the service by deception, threat, or false token; . . . ." *Id.* tit. 7, § 31.06 (Vernon 1974) states in pertinent part:

> (a) If the actor obtained property or secured performance of services by issuing or passing a check or similar sight order for the payment of money, when the issuer did not have sufficient funds in or on deposit with the bank or other drawee for the payment in full of the check or order as well as all other checks or orders then outstanding, his intent to deprive the owner of property under Section 31.03 of this code (Theft) or to avoid payment for service under Section 31.04 of this code (Theft of Service) is presumed (except in the case of a postdated check or order) if:
>
> > (1) he had no account with the bank or other drawee at the time he issued the check or order; or
> >
> > (2) payment was refused by the bank or other drawee for lack of funds or insufficient funds, on presentation within 30 days after issue, and the issuer failed to pay the holder in full within 10 days after receiving notice of that refusal.

See generally Douglas, *The Hot Check Statute,* 4 S. TEX. L.J. 303 (1959) (discussing the Texas statute).

[56] 22 Utah 2d 31, 448 P.2d 346 (1968).

that the bad check statute[57] had been violated because the check was given for labor performed.[58]

It is apparent that the decision in *Hindman* is consistent with decisions rendered under similar statutes in other jurisdictions. As a result of the court's decision in *Hindman,* however, it is clear that the Mississippi statute as it presently reads is not fulfilling its purpose—preventing the disruption of business by the use of bad checks.[59]

To alleviate this problem the Mississippi Legislature should enact a new statute which prohibits the issuance of bad checks regardless of when and why they are given. By making minor changes in Mississippi's present statute[60] and adopting provisions similar to those of the Model Penal Code[61] or statutes of states such as Alaska,[62] the Mississippi Legislature could more effectively deter the issuance of bad checks.

B. Right to Carry a Weapon

The second amendment of the United States Constitution provides: "A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed."[63] Although the right to keep and bear arms is stated in unequivocal terms, it is not an absolute right.[64] This right may be curtailed by the state as long as the United States is not deprived of its resources for maintaining public security.[65] This limitation on the right to keep and bear arms was established by the United States Supreme Court in *United States v. Cruikshank*[66] in 1875. The Court held that:

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[57] *Pfannenstiel* construed an older statute which was broader than the one currently in force, UTAH CODE ANN. § 76-6-505 (1978). Therefore, it is unsettled whether the result in *Pfannenstiel* would change under the new statute. UTAH CODE ANN. § 76-6-505 (1978) provides in pertinent part:

> (1) Any person who issues or passes a check for the payment of money, for the purpose of obtaining from any person, firm, partnership, or corporation, any money, property, or other thing of value or paying for any services, wages, salary, labor, or rent, knowing it will not be paid by the drawee and payment is refused by the drawee, is guilty of issuing a bad check.

[58] 448 P.2d at 347.

[59] *See* Warner, *Bad Checks,* 37 MISS. L.J. 86, 86 (1965) (discussing purpose of statute).

[60] MISS. CODE ANN. §§ 97-19-55, -57 (Supp. 1980).

[61] Model Penal Code §§ 223.1(2), 223.3, 224.5 (Proposed Official Draft, 1962).

[62] ALASKA STAT. § 11.46.280 (1980). Other statutes with similar provisions include: CONN. GEN. STAT. ANN. § 53a-128 (West 1972); DEL. CODE ANN. tit. 11, § 900 (1974); MO. ANN. STAT. § 570.120 (Vernon 1979); OHIO REV. CODE ANN. § 2913.11 (Page 1975); WASH. REV. CODE ANN. § 9A.56.060 (Supp. 1980-81).

[63] U.S. CONST. amend. II.

[64] For general discussions of the history and development of the right, see Feller & Gotting, *The Second Amendment: A Second Look,* 61 NW. U.L. REV. 46 (1966); Hays, *The Right to Bear Arms, A Study in Judicial Misinterpretation,* 2 WM. & MARY L. REV. 381 (1960); Levin, *The Right to Bear Arms: The Development of the American Experi-*

> [The right to keep and bear arms] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but *this,* as has been seen, *means no more than that it shall not be infringed by Congress.* This is one of the amendments that has no other effect than to restrict the powers of the national government . . . .[67]

The Court reaffirmed its decision in *Presser v. Illinois* in 1886[68] and again in 1939 in *United States v. Miller.*[69]

In Mississippi, section 97-37-1 of the Mississippi Code prohibits the carrying of a deadly weapon which is concealed in whole or in part.[70] This statute is within the allowable curtailment and is, there-

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ence, 48 CHI.-KENT L. REV. 148 (1971); Levine & Saxe, *The Second Amendment: The Right to Bear Arms,* 7 HOUS. L. REV. 1 (1969); Mann, *The Right to Bear Arms,* 19 S.C.L. REV. 402 (1967); Weatherup, *Standing Armies and Armed Citizens: An Historical Analysis of the Second Amendment,* 2 HASTINGS CONST. L.Q. 961 (1975); Whisker, *Historical Development and Subsequent Erosion of the Right to Keep and Bear Arms,* 78 W. VA. L. REV. 171 (1975-76); Note, *The Right to Keep & Bear Arms,* 26 DRAKE L. REV. 423 (1976-77); Note, *Constitutional Limitations on Firearms Regulation,* 1969 DUKE L.J. 773.

[65] Presser v. Illinois, 116 U.S. 252, 265 (1886).

[66] 92 U.S. 542 (1875).

[67] *Id.* at 553 (emphasis added).

[68] 116 U.S. 252 (1886).

[69] 307 U.S. 174 (1939). It should be noted that *Cruikshank, Presser,* and *Miller* were decided at a time when the prevailing attitude among justices of the United States Supreme Court was that the Bill of Rights did not apply to or restrict the states. Since that time, the fourth amendment search and seizure provision (Mapp v. Ohio, 367 U.S. 643, 660 (1961)), the fifth amendment double jeopardy provision (Benton v. Maryland, 395 U.S. 784, 794 (1969)) and privilege against self-incrimination (Malloy v. Hogan, 378 U.S. 1, 6 (1964)), the sixth amendment provisions concerning speedy trial (Klopfer v. North Carolina, 386 U.S. 213, 225-26 (1967)), public trial (*In re* Oliver, 333 U.S. 257, 278 (1948)), jury trial (Duncan v. Louisiana, 391 U.S. 145, 157-58 (1968)), confrontation of witnesses (Pointer v. Texas, 380 U.S. 400, 403 (1965)), compulsory process (Washington v. Texas, 388 U.S. 14, 19 (1967)), and right to counsel (Gideon v. Wainwright, 372 U.S. 335, 339-40 (1963) and Argersinger v. Hamlin, 407 U.S. 25, 40 (1972)), and the eighth amendment cruel and unusual punishment provision (Robinson v. California, 370 U.S. 660, 667 (1962)) have been held applicable to the states.

[70] MISS. CODE ANN. § 97-37-1 (1972) provides:

> Any person who carries, concealed in whole or in part, any bowie knife,

fore, constitutional[71] because a concealed weapon has no "reasonable relationship to the preservation or efficiency of a well regulated militia."[72] A defense to an indictment under section 97-37-1 is provided for in section 97-37-9.[73] This section states that a person may prove "that he was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend."[74] These two provisions of the Mississippi Code were addressed by the Mississippi Supreme Court this year in *Ray v. State.*[75]

Ray was indicted for the murder of Brantley. Both men had participated in a dice game which ended in an argument. At trial, the evidence conflicted on whether Ray drew his pistol first and was then

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dirk knife, butcher knife, switchblade knife, metallic knuckles, blackjack, slingshot, pistol, revolver, or any rifle with a barrel of less than sixteen (16) inches in length, or any shotgun with a barrel of less than eighteen (18) inches in length, machine gun or any fully automatic firearm or deadly weapon, or any muffler or silencer for any firearm, whether or not it is accompanied by a firearm, or uses or attempts to use against another person any imitation firearm, shall upon conviction be punished as follows . . . .

[71] Wilson v. State, 81 Miss. 404, 33 So. 171 (1903).

[72] United States v. Miller, 307 U.S. 174, 178 (1939).

[73] Miss. Code Ann. § 97-37-9 (Supp. 1980) states:

> Any person indicted or charged for a violation of section 97-37-1 may show as a defense:
>
> (a) that he was threatened, and had good and sufficient reason to apprehend a serious attack from any enemy, and that he did so apprehend; or
>
> (b) that he was traveling and was not a tramp, or was setting out on a journey and was not a tramp; or
>
> (c) that he was a law enforcement or peace officer in the discharge of his duties; or
>
> (d) that he was at the time in the discharge of his duties as a mail carrier; or
>
> (e) that he was at the time engaged in transporting valuables for an express company or bank; or
>
> (f) that he was a member of the Armed Forces of the United States, National Guard, State Militia, Civil Defense Corps, guard or patrolman in a state or municipal institution while in the performance of his official duties; or
>
> (g) that he was in lawful pursuit of a felon; or
>
> (h) that he was lawfully engaged in legitimate sports; or
>
> (i) that at the time he was a company guard, bank guard, watchman, or other person enumerated in section 97-37-7, and was then actually engaged in the performance of his duties as such, and then held a valid permit from the sheriff, the commissioner of public safety, or a valid permit issued by the secretary of state prior to May 1, 1974, to carry the weapon; and the burden of proving either of said defenses shall be on the accused.

[74] *Id.*

[75] 381 So. 2d 1032 (Miss. 1980).

threatened by Brantley or vice versa. In any event, Ray shot and killed Brantley. Ray was convicted of manslaughter.[76] The trial court refused the following instruction:

> You are instructed that under the law a man is justified in carrying a weapon if his life has been threatened or he has been threatened with great bodily harm and he has a good and sufficient reason to apprehend an attack from an enemy, and if you believe from the testimony in this case that the defendant's life had been threatened or that the defendant had been threatened with great bodily harm, and therefore had reason to apprehend a serious attack, then the defendant was justified in carrying a pistol.[77]

There are two conflicting lines of cases in Mississippi on the issue of whether a defendant is entitled to such an instruction. In *Smith v. State*,[78] the defendant rented a gun, allegedly to go bird hunting. Instead, he met Jemison on the street, and killed him in an ensuing shoot-out. The Mississippi Supreme Court held that the defendant, Smith, was entitled to the following instruction:

> The court instructs the jury that if they believe, from the evidence, that defendant procured the gun to go bird hunting, or if they believe from the evidence that, a short time before the difficulty, deceased threatened to kill the defendant, then the defendant in either case had a right to procure a gun and carry it.[79]

The 1921 case of *Molphus v. State*[80] also involved a shooting death. The victim was sitting in front of a store when Molphus approached and shot him six times. There had been previous difficulties between the two men, and Molphus testified that the victim had moved as if to reach for a weapon. The supreme court upheld the trial court's refusal of the following instruction:

> The court instructs the jury for the defendant that the defendant had a right to carry a pistol to protect himself from loss of life or great bodily harm at the hands of Mr. Owen [the victim], providing the jury believe [*sic*] that the defendant rea-

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[76] *Id.* at 1033-34.

[77] *Id.* at 1034.

[78] 75 Miss. 542, 23 So. 260 (1898).

[79] *Id.* at 553, 23 So. at 264.

[80] 124 Miss. 584, 87 So. 133 (1921).

> sonably believed that there was danger of such threats being executed.[81]

The court reasoned that since the defendant was not on trial for carrying a concealed weapon, the trial court's refusal of the instruction was proper.

The court followed its *Molphus* decision in 1930 in *Durham v. State.*[82] Russell was angered because Durham had taken Russell's daughters to a movie and had failed to return within a reasonable time. In the ensuing argument, each man threatened the other. Both men left the house but returned later. When Russell put his hand in his pocket as if to draw a weapon, Durham shot him four or five times. Durham was convicted of murder.[83] Citing *Molphus,* the supreme court upheld the trial court's refusal of the following instruction:

> The court charges the jury for the defendant, that if they believe from the evidence in this case, that a short time before the difficulty, the deceased threatened to kill the defendant, then the defendant had a right under the law to procure a pistol and carry it.[84]

Two years later a divided court ignored *Molphus* in *Wood v. State.*[85] There was evidence of previous problems between the defendant and the victim.[86] When Wood approached Fleming, the victim, to talk with him[87] a struggle ensued with both men shooting and being wounded.[88] Within minutes, Fleming died,[89] and Wood was indicted for murder and later convicted of manslaughter.[90] The supreme court reversed the conviction, holding that Wood was entitled to the following instruction:

> The court charges the jury for the defendant, that, if the defendant had been informed and believed that his life had

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[81] *Id.* at 597, 87 So. at 135.

[82] 158 Miss. 833, 131 So. 422 (1930).

[83] *Id.* at 837-38, 131 So. at 423.

[84] *Id.* at 842, 131 So. at 425.

[85] 165 Miss. 363, 144 So. 545 (1932); *see* Shannon v. State, 237 Miss. 550, 555, 115 So. 2d 293, 295 (1959) (noting that *Wood* ignored *Molphus*).

[86] 165 Miss. at 372, 144 So. at 547-48.

[87] *Id.* at 368-69, 144 So. at 545-46.

[88] *Id.* at 368-69, 144 So. at 546. Wood testified that he was armed because he had received information that a mob was being organized in Fleming's community, and that his life was in danger. *Id.* at 372, 144 So. at 547.

[89] *Id.* at 370, 144 So. at 548.

[90] *Id.* at 364, 144 So. at 545.

> been threatened, or that he was threatened with great bodily harm, that he had a lawful right to carry a concealed weapon. And the court charges the jury further that while so armed, he had a lawful right to approach the deceased, Fleming, on any peaceable mission or purpose and to use the said deadly weapon in defense of his life, or himself from great bodily harm from an attack made upon him by Fleming.[91]

The court concluded that the instruction should have been granted to inform the jury that Wood had a right to be armed because of threats made against him and that he had a right to approach Fleming on a peaceable mission.[92]

The court in 1959 relied on *Molphus* and *Durham* in refusing the following instruction in *Shannon v. State*:[93]

> The Court instructs the jury for the defendant that if the defendant Frank Shannon had been informed and believed that his life had been threatened, or that he was threatened with great bodily harm, he had a lawful right to carry a concealed deadly weapon. And the Court charges the jury further that while so armed he had the right to use the said deadly weapon in defense of his life, or himself from great bodily harm, from any attack made on him . . . .[94]

The victim, Hendrick, had returned home unexpectedly from a trip and found Shannon with his wife.[95] Hendrick had no weapon and did not threaten Shannon.[96] Shannon testified, however, that Hendrick chased him with a knife. Shannon shot Hendrick, and was consequently charged with assault and battery with intent to kill.[97] The supreme court upheld Shannon's conviction and distinguished *Wood* by limiting that decision "to the peculiar circumstances of that case, where the instruction joined the right to carry the weapon with the right to approach deceased on a peaceful mission."[98]

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[91] *Id.* at 373-74, 144 So. at 547.

[92] *Id.* at 374-75, 144 So. at 548.

[93] 237 Miss. 550, 115 So. 2d 293 (1959).

[94] *Id.* at 554, 115 So. 2d at 294.

[95] *Id.* at 553, 115 So. 2d at 293.

[96] *Id.*, 115 So. 2d at 293. Shannon's testimony was indefinite as to threats of killing directed against him. *Id.* at 554, 115 So. 2d at 294.

[97] *Id.* at 553, 115 So. 2d at 293. Shannon testified that he shot Hendrick in self-defense. *Id.*, 115 So. 2d at 293.

[98] *Id.* at 556, 115 So. 2d at 295. *See* Stubbs v. State, 311 So. 2d 339, 340-41 (Miss. 1975) (instruction granted in *Wood* refused because there was no evidence that defen-

In 1975 the court returned to the position taken in *Wood.* In *Austin v. State*[99] Elisa Benjamin, while on a date with the defendant, called her father to pick her up. Later that evening Austin approached Elisa, her father, and her uncle and asked to speak with Elisa. While Austin, Elisa, and her father were talking, her uncle began to push and slap Austin. Elisa's brother shot his rifle into the air to scare Austin. In the ensuing melee, Austin shot and killed the uncle. Austin was convicted of murder.[100] The supreme court held that Austin was entitled to an instruction on his right to carry a deadly weapon.[101] The court's decision was based on the fact that the state had attempted to prove that Austin was also guilty of carrying a concealed weapon.[102]

In the instant case, *Ray v. State,* the supreme court held that the defendant was entitled to an instruction[103] on his right to carry a weapon under the circumstances set forth in section 97-37-9.[104] The court expressly overruled the *Molphus* line of cases (*Molphus, Durham,* and *Shannon*) to the extent that those cases conflicted with the *Ray* decision.[105] The decision does not, however, specify what points of conflict are overruled.

A closer reading of the *Molphus* opinion reveals that although the challenged instruction was properly refused since the defendant was not on trial for carrying a concealed weapon, and the court was not required to instruct the jury on his right to carry a weapon, another very similar instruction was given. That instruction provided:

> The court charges the jury at the request of the defendant that under the law a man is justifiable in carrying a concealed

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dant approached deceased on a peaceful mission).

[99] 324 So. 2d 245 (Miss. 1975).

[100] *Id.* at 246.

[101] *Id.* at 250. The granted instruction read as follows: "[I]f the life of the defendant had been threatened and he had good reason to apprehend a serious attack, he had the right under the law to arm himself by carrying a concealed weapon, and was not required to temporarily disarm himself whenever he was in no apparent danger." *Id.* at 249.

[102] *Id.* at 250. This case does not fit neatly into the *Wood* line of cases since *Austin* specifically involved a concealed weapons charge which necessitated the instruction regardless of the other facts of the case; *Wood* and *Smith,* on the other hand, did not involve concealed weapons charges. *Id.*

[103] In accordance with the general rule, the court concluded that the defendant was entitled to an instruction on the right to carry a concealed weapon only if evidence supported such an instruction. 381 So. 2d at 1035.

[104] *See* note 73 *supra.*

[105] 381 So. 2d at 1035. The court reasoned that the jury should understand the defendant's right to carry a concealed weapon under the circumstances set forth in MISS. CODE ANN. § 97-37-9 (Supp. 1979).

> weapon if his life has been threatened and he has a good and sufficient reason to apprehend a serious attack from an enemy, and if you believe from the testimony in this case that Molphus' life had been threatened and he had reason to apprehend a serious attack, then he was justified in carrying a pistol.[106]

Far from being the origin of a separate line of cases, the *Molphus* decision espoused very much the same principle that the *Wood* line of cases did.[107] Furthermore, the cases following *Molphus*[108] do not indicate a principle any different from that in *Wood*.[109] In *Shannon,* the court cited *Molphus* and attempted to distinguish *Wood,* stating that "the Court [in *Wood*] noted it was important under the particular facts for the jury to understand that Wood had a right to approach Fleming in a peaceable manner,"[110] and that this factor was not present in the *Shannon* case.[111] In *Wood,* however, the court said that the defendant possessed two separate rights: "[I]t was a matter of vital importance for the jury to understand [1] that Dr. Wood had a right to be armed because of threats made against him and [2] that he had a right, being so armed, to approach Fleming in a peaceable manner . . . ."[112] The opinion in *Wood* did not indicate whether both rights must exist to justify an instruction on a defendant's right to carry a weapon.

Assuming that the *Wood* decision did mandate that both rights must exist and that the *Shannon* opinion was correct in limiting *Wood* to the "peculiar circumstances . . . where the instruction joined the right to carry the weapon with the right to approach deceased on a peaceful mission,"[113] this requirement is evidently what the court in *Ray* was overruling since it is the only conflicting point in the seven cases.

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[106] 124 Miss. 584, 597, 87 So. 133, 135 (1921).

[107] In *Ray,* the court noted two divergent lines of cases dealing with the granting of an instruction on a defendant's right to carry a weapon, but reasoned that the *Molphus* case was inconclusive. 381 So. 2d at 1035.

[108] The court in *Ray* also cited Richey v. State, 220 Miss. 790, 72 So. 2d 152 (1954) as part of the *Molphus* progeny. 386 So. 2d at 1034. *Richey,* however, was concerned with an instruction on the use of a weapon in self-defense, not the right to carry a weapon. The *Richey* court held that since the defendant was given four detailed instructions on the theory of self-defense, refusal of defendant's instruction on his right to use a deadly weapon in self-defense was proper. 220 Miss. at 793, 72 So. 2d at 153.

[109] The court in *Durham* merely cited *Molphus* with no further explanation. 158 Miss. at 842, 131 So. at 425. Apparently, the *Durham* court simply overlooked a paragraph in the *Molphus* opinion. The court did not focus on the *Molphus* rationale that an instruction on the right to carry a weapon may be refused where an instruction in general terms on that right is given. 124 Miss. at 597, 87 So. at 135.

[110] 237 Miss. at 556, 115 So. 2d at 295.

[111] *Id.,* 115 So. 2d at 295.

[112] 165 Miss. at 374-75, 144 So. at 548.

C. *Right to Speedy Trial*

The sixth amendment of the Constitution of the United States guarantees the right to a speedy trial.[114] In Mississippi, that right finds expression in section 99-17-1 of the Mississippi Code, which provides: "Unless good cause be shown, and a continuance duly granted by the court, all offenses for which indictments are presented to the court shall be tried no later than two hundred seventy (270) days after the accused has been arraigned."[115] Until this year, the Mississippi Supreme Court had only two opportunities to address the statute.

The first of these cases was *Payne v. State*[116] in 1978. The defendant was indicted on August 16, 1976, and brought to trial on August 31, 1977.[117] The only delay attributable to the defendant was the interim between the date he requested a continuance (December 3, 1976) and the date of the next term of court (February, 1977). No reason was given for the remaining delay. The Mississippi Supreme Court held that the trial court erred in not dismissing the indictment because the defendant had been denied his right to a speedy trial.[118]

The following year, the court in *Durham v. State*[119] found no violation of the defendant's right to a speedy trial.[120] In *Durham,* the defendant was indicted in April of 1977 and arraigned on April 28, 1977, but was not tried until November 22, 1978. All delays except one, however, were attributable to the defendant, and good cause was shown by the state for the single delay it requested.[121]

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[113] 237 Miss. at 556, 115 So. 2d at 295.

[114] U.S. CONST. amend. VI. For a general discussion of the right to a speedy trial, see Hansen & Reed, *The Speedy Trial Act of 1974 in Constitutional Perspective,* 47 MISS. L.J. 365 (1976); Kozinski, *That Can of Worms: The Speedy Trial Act,* 62 A.B.A. J. 862 (1976); Platt, *The Speedy Trial Act of 1974: A Critical Commentary,* 44 BROOKLYN L. REV. 757 (1978); Rudstein, *The Right to a Speedy Trial:* Barker v. Wingo *in the Lower Courts,* 1975 U. ILL. L.J. 11; Wideikis, *Rejection of the Compensatory Remedy with Respect to the Right to a Speedy Trial: The Conclusion of the Marion-Barker-Strunk Trilogy,* 7 J. MAR. J. PRAC. & PROC. 253 (1974); *Speedy Trials: An Overview of the Constitutional Right and the Federal and Texas Statutes,* 10 TEX. TECH. L. REV. 1043 (1979); Comment, *The Speedy Trial Guarantee: Criteria and Confusion in Interpreting Its Violation,* 22 DE PAUL L. REV. 839 (1973); Note, *The Constitutional Guarantee of Speedy Trial,* 8 IND. L. REV. 414 (1974).

[115] MISS. CODE ANN. § 99-17-1 (Supp. 1980).

[116] 363 So. 2d 278 (Miss. 1978).

[117] *Id.* at 278.

[118] *Id.* at 279.

[119] 377 So. 2d 909 (Miss. 1979).

[120] *Id.* at 910.

In 1980, the Mississippi Supreme Court again addressed the statute providing for a speedy trial in *Turner v. State,*[122] *State v. Davis,*[123] *Lee v. State,*[124] and *Atkinson v. State.*[125] The court in *Lee v. State* merely found all delays in excess of 270 days attributable to the defendant without further comment.[126] In *Atkinson v. State,* the court held that the right to a speedy trial did not extend to the appeal and since the defendant's first trial was within the 270 day limit, his right had not been violated.[127]

The defendant in *Turner v. State*[128] was arraigned on July 11, 1977, and tried on November 27, 1978. The court held that the state did not show good cause to excuse the delay.[129] The defense attorney filed a motion for a psychiatric examination on July 25, 1977. The order for the examination was signed on August 8, 1977. A second firm of attorneys was appointed to represent the defendant in December, 1977, after he had dismissed his first counsel. It was discovered that the order for the psychiatric examination of August 8, 1977, had not been entered on the docket. This order was docketed and filed on April 7, 1978. At the trial court's request, a new motion for a psychiatric examination was filed and an order was entered on June 30, 1978. The examination was completed and a report returned to the trial court on July 13, 1978. On September 12, 1978, Turner's attorneys filed a motion to dismiss for failure to bring the defendant to trial within 270 days.[130] The trial court denied this motion. The supreme court held that the entire burden of bringing the defendant to trial was upon the state, and it was error to place the responsibility for the psychiatric examination on the defendant.[131]

In his dissenting opinion, Justice Bowling pointed out that Turner's attorney had requested the psychiatric examination and knew that if the psychiatric examination was delayed, a delay in Turner's trial would be inevitable.[132] Justice Bowling stated further that the majority's reliance on *Barker v. Wingo*[133] was misplaced because *Barker* imposed a duty on defense counsel not to sit back and allow time to elapse so that the speedy trial issue would bar the defendant's trial.[134]

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[121] *Id.* at 909-10.

[122] 383 So. 2d 489 (Miss. 1980).

[123] 382 So. 2d 1095 (Miss. 1980).

[124] 383 So. 2d 821 (Miss. 1980).

[125] 392 So. 2d 205 (Miss. 1980).

[126] 383 So. 2d at 822.

[127] 392 So. 2d at 208.

[128] 383 So. 2d 489 (Miss. 1980).

[129] *Id.* at 490-91.

[130] *Id.* at 490.

[131] *Id.* at 490-91.

It appears the state did nothing to cause a delay in Turner's trial. According to the majority opinion, however, the state erred in failing to oversee Turner's defense. If the state is to be responsible for the docketing, filing, and carrying out of a defendant's motions, a question is raised concerning the state's responsibility for other portions of the defendant's case. It is true that a "defendant has no duty to bring himself to trial,"[135] but surely he should be responsible for his own defense.

One week after its decision in *Turner*, the Mississippi Supreme Court in *State v. Davis*[136] reversed the trial court's dismissal of an indictment because the defendants were not brought to trial until 340 days after arraignment. The court totaled the number of days attributable to delays caused by the defendants, subtracted the amount from the total of 340 days, and found that the remainder was less than 270 days.[137] The court's decision was based on the defendants' failure to assert their right to a speedy trial or to object to the delays, thereby providing "good cause" for the delays through their silence.[138] The court also held that the delays did not prejudice the defendants. *Turner* was distinguished by the court on the basis that the prosecution in *Turner* failed to obtain any continuances and the defendant was prejudiced by the delay.[139]

Although Mississippi's speedy trial statute is "plain and unambiguous,"[140] decisions concerning the dismissal of an indictment when the period between arraignment and trial exceeds 270 days are usually made on an ad hoc basis. In the future, the trial courts must determine the extent to which the state is responsible for a defendant's case. Once this line is drawn, trial courts face an even greater dilemma in defining and applying the nebulous term "good cause." Section 99-17-1 and the Mississippi Supreme Court decisions applying this section will provide Mississippi courts with an array of problems and will leave the state's prosecutors in a quandry regarding the duties required of them.

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[132] *Id.* at 493 (Bowling, J., dissenting).

[133] 407 U.S. 514 (1972).

[134] 383 So. 2d at 493 (Bowling, J., dissenting). In *Barker*, the United States Supreme Court stated:

> But the rule we announce today, which comports with constitutional principles, places the *primary* burden on the courts and the prosecutors to assure that cases are brought to trial. We hardly need add that *if delay is attributable to the defendant, then his waiver may be given effect* under standard waiver doctrine . . . .

407 U.S. 514, 529 (1972) (emphasis added).

[135] 407 U.S. at 527.

[136] 382 So. 2d 1095 (Miss. 1980).

[137] *Id.* at 1097.

[138] *Id.* at 1097-98.

[139] *Id.* at 1098.

[140] Turner v. State, 383 So. 2d at 491.

D. *Defendant's Presence at Crucial Stages in the Trial*

The United States Supreme Court in *Faretta v. California*[141] stated that an accused has a "right to be present at all stages of the proceedings where fundamental fairness might be thwarted by his absence."[142] In 1980, the Mississippi Supreme Court relied on *Faretta* in *Allen v. State,*[143] holding that the absence of the defendants, Allen and Chamblee, during the judge's interrogation of a potential witness constituted reversible error.[144] Allen and Chamblee were indicted and tried for the attempted rape of a female under the age of twelve years. One of the state's principal witnesses was a nine year old girl. The circuit court judge questioned the girl in his chambers in the presence of a deputy sheriff and a welfare department worker to determine the girl's competency as a witness. The girl was allowed to give testimony very damaging to the defendants.[145]

Since the Mississippi Supreme Court had never ruled on this precise issue, the court reviewed decisions from other jurisdictions[146] and an analogous Mississippi case. The Mississippi case, *Myers v. State,*[147] involved a motion by the defense attorney for permission to withdraw as counsel. This motion was made and argued in the judge's chambers out of the defendant's presence. The defense attorney made certain accusations against the defendant during the proceeding. The supreme court held that the defendant had a right to be present at this crucial stage in the proceeding to explain his actions and opinions.[148]

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[141] 422 U.S. 806 (1975).

[142] *Id.* at 816 (citing Snyder v. Massachusetts, 291 U.S. 97, 106 (1933)).

[143] 384 So. 2d 605 (Miss. 1980).

[144] *Id.* at 607-08.

[145] *Id.* at 607.

[146] *Id.* at 607-08. The court considered the following cases: Hill v. Commonwealth, 474 S.W.2d 95, 98-99 (Ky. 1971) (use of evidence obtained in court of inquiry where neither defendant nor counsel were present violated constitutional rights); Tisdale v. State, 41 Md. App. 149, 396 A.2d 289, 292-93 (Ct. Spec. App. 1979) (right of presence at trial is fundamental); State v. Grey, 256 N.W.2d 74, 76-77 (Minn. 1977) (defendant's absence from pretrial suppression hearing violated due process and confrontation clauses of state and federal constitutions).

[147] 254 So. 2d 891 (Miss. 1971).

Boyington v. State[149] and *Lampkin v. State,*[150] both involving the defendant's presence at certain stages of the trial, were also decided this year. The Mississippi Supreme Court in *Boyington* held that a discussion with the judge concerning the plea bargaining agreement was not a crucial stage at which the defendant's presence was necesssary.[151] The court held in *Lampkin* that the defendant's presence was not required when one of the defendant's attorneys presented a motion in the judge's chambers to withdraw as counsel.[152] The *Lampkin* court distinguished *Myers v. State,* stating that in *Myers* certain accusations were made against the defendant to which he had a right to respond.[153] In this case, however, there were no accusations and no resulting prejudice to the defendant. Furthermore, Lampkin's other counsel was completely familiar with the case and adequately represented him.[154]

In *Walters v. State*[155] the Mississippi Supreme Court, relying on the decision of the United States Supreme Court in *Illinois v. Allen,*[156] held that a court may remove a defendant from the courtroom.[157] The defendant argued that his removal from the courtroom was without sufficient provocation. The court, however, found the defendant's conduct so disruptive that his removal was justified.[158]

The Mississippi Constitution guarantees a defendant the right to be present at his trial.[159] This right may be waived, however, as codified at section 99-17-9 of the Mississippi Code.[160] In *Thomas v. State,*[161] the Mississippi Supreme Court held that this statute was constitutional. In addition, the court stated that under the statute a defendant may waive his right to be present, and the trial may proceed in his absence at the discretion of the judge.[162]

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[148] *Id.* at 892-93.

[149] 389 So. 2d 485 (Miss. 1980).

[150] 389 So. 2d 113 (Miss. 1980).

[151] 389 So. 2d at 489-91.

[152] *Id.* at 114-15.

[153] *Id.*

[154] *Id.*

[155] 391 So. 2d 645 (Miss. 1980).

[156] 397 U.S. 337 (1970). The defendant in *Allen* was so disruptive that the trial court ordered the defendant removed from the courtroom. *Id.* at 340-41. The Court held that a defendant may lose his right to be present at a trial after he has been warned by the judge that he will be removed if he continues to be disruptive, and yet continues such behavior. *Id.* at 343; *see* Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (the right to be present at one's trial may be lost by misconduct).

[157] 391 So. 2d at 651.

[158] *Id.* at 645. The sixth amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. CONST. amend. VI; *see* Goldin, *Presence of the Defendant at Rendition of the Verdict in Felony Cases,* 16 COLUM. L. REV. 18, 18-21 (1916) (development of the right of the defendant to be present).

In *Walters* the trial judge repeatedly warned the defendant that although he had a right to be present, he would be removed unless he conducted himself properly.[163] The Mississippi Supreme Court held that since the trial court acted within its proper discretion and with great patience, it was not an error or a denial of the defendant's constitutional right for the court to remove the defendant from the courtroom, and then to allow him to return at his request.[164]

Unlike the court's approach to cases involving a defendant's right to a speedy trial, the supreme court supplied the trial courts with some guidance in this area. The court in *Allen v. State* stated the general rule for determining when a defendant should be present:

> [A] defendant's right of presence is a fundamental one not to be trifled with; and if a particular matter or event arising during the course of a trial is a 'stage of the trial' requiring the defendant's presence, the doubt should, wherever possible, be

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[159] MISS. CONST. art. 3, § 26. "In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him . . . ." *Id.*

[160] MISS. CODE ANN. § 99-17-9 (1972) provides:

> In criminal cases the presence of the prisoner may be waived, and the trial progress, at the discretion of the court, in his absence, if he be in custody and consenting thereto. If the defendant, in cases less than felony, be on recognizance or bail or have been arrested and escaped, or have been notified by the proper officer of the pendency of the indictment against him, and resisted or fled, or refused to be taken, or be in any way in default for nonappearance, the trial may progress at the discretion of the court, and judgment final and sentence be awarded as though such defendant were personally present in court.

See Myers v. State, 268 So. 2d 353, 357-58 (Miss. 1972) (defendant's absence from in-chambers conference was voluntary).

[161] 117 Miss. 532, 540, 78 So. 147, 148 (1918) (defendant was charged with murder).

[162] *Id.* at 542, 78 So. at 148; *see* McMillian v. State, 361 So. 2d 495, 497 (Miss. 1978) (since defendant was in custody and left the trial voluntarily, he waived his right to be present); Stokes v. State, 128 So. 2d 341, 349-50 (Miss. 1961) (defendant's attorney waived presence of the defendant, and motion for a new trial did not require presence of the defendant); Brister v. State, 231 Miss. 722, 726, 97 So. 2d 654, 655 (1957) (defendant was absent voluntarily from the judge's chambers during challenges to jurors).

[163] 391 So. 2d at 646-48.

[164] *Id.* at 651.

resolved in his favor; i.e., mandating his presence.[165]

E. *Jury Instructions on Competency of Witnesses*

The English common law did not recognize a defendant's right to testify at his own trial.[166] During the nineteenth century, state legislatures enacted statutes abrogating the common law rule that defendants were incompetent to testify in a criminal trial.[167] In 1880, the Mississippi Legislature enacted a law permitting the accused to testify in his own behalf.[168]

Since the common law rule was abolished, the Mississippi Supreme Court has decided several cases involving jury instructions which concern the competency and weight of a defendant's testimony. In *Thomas v. State*[169] the court held that an instruction that the defendant's testimony should be weighed carefully and his motives for testifying should be considered constituted reversible error.[170] Similarly, the court held in *Sumrall v. State*[171] that the granting of an instruction authorizing the jury to consider the motives and interest of the defendant in testifying was a reversible error, reasoning that such an instruction would render the defendant's right to testify in his own behalf worthless.[172]

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[165] 384 So. 2d 605, 608 (Miss. 1980) (citing Tisdale v. State, 41 Md. App. 149, 396 A.2d 289, 292 (Ct. Spec. App. 1979)).

[166] Yates v. United States, 227 F.2d 844, 846 (9th Cir. 1955) (defendant's right to testify in his own defense denied by common law criminal courts); Roberts v. Georgia, 139 Ga. 36, 5 S.E.2d 340, 343 (1939) (common law rule that defendant could not testify unchanged in Georgia). *See generally* 2 J. WIGMORE, EVIDENCE 674-86 (3d ed. 1940) (discussion of interest-disqualification of witnesses at common law); Hammerman, *A Criminal Defendant's Constitutional Right to Testify—The Implications of United States Ex Rel. Wilcox v. Johnson*, 23 VILL. L. REV. 678, 680-81 (1978) (discussion of constitutional right to testify).

[167] *See* Hammerman, *supra* note 166, at 681. By 1960, Georgia was the only state which still retained the common law rule preventing a defendant from testifying in his own behalf. Ferguson v. Georgia, 365 U.S. 570, 570 (1961). The United States Supreme Court found the rule to be unconstitutional under the fourteenth amendment. *Id.* at 596.

[168] *See* MISS. CODE ANN. § 13-1-9 (1972). This statute provides: "The accused shall be a competent witness for himself in any prosecution for crime against him. The failure of the accused, in any case, to testify shall not however operate to his prejudice or be commented on by counsel."

[169] 61 Miss. 60, 65 (1883) (defendant indicted for murder).

[170] *Id.*; *accord*, Woods v. State, 67 Miss. 575, 576, 7 So. 495, 496 (1890) (defendant had a right to submit his testimony to the jury uninfluenced by suggestions of probable falsity).

[171] 343 So. 2d 481 (Miss. 1977).

[172] *Id.* at 482. On numerous occasions, the court has found similar instructions to be

Defendants have had some success in obtaining instructions that they are competent witnesses. In a one-sentence opinion, the Mississippi Supreme Court held that the defendant in *McVay v. State*[173] was entitled to an instruction that he was a competent witness.[174] In *Conn v. State*,[175] the court agreed with the holding in *McVay*,[176] but did not permit a portion of an instruction which indicated the weight to be given to the testimony.[177]

Although generally an instruction concerning the weight to be given to a defendant's testimony is not allowed,[178] in situations where

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improper. *See, e.g.*, Bryson v. State, 291 So. 2d 693, 694 (Miss. 1974) (judge erred in instructing jury to consider interest of witness); Smith v. State, 90 Miss. 111, 115, 43 So. 465, 465 (1907) (error to call attention to defendant's interest where he was the only witness to the fact).

In *Sumrall*, the court explicitly overruled Brown v. State, 75 Miss. 842, 23 So. 422 (1898). 343 So. 2d at 482. In *Brown* the jury was authorized to consider "the motives and interests of the witness." 75 Miss. at 843, 23 So. at 423. The court found the instruction to be proper, reasoning that the instruction put the defendant on an equal footing with other witnesses. *Id.* at 846, 23 So. at 423.

MISS. CODE ANN. § 99-17-35 (1972) states that "[t]he judge in any criminal cause, shall not sum up or comment on the testimony, or charge the jury as to the weight of the evidence."

[173] 26 So. 947 (Miss. 1900).

[174] *Id.* at 947.

[175] 205 Miss. 165, 38 So. 2d 697 (1949).

[176] *Id.* at 170, 38 So. 2d at 698. The appellant relied on Thompson v. State, 158 Miss. 121, 130 So. 112 (1930), in requesting the instruction. 205 Miss. at 169, 38 So. 2d at 698. In *Thompson* the court found permissible an instruction which stated:

> The court instructs the jury for the defendants, that the defendants are competent witnesses in their own behalf and that you have no right to discard their testimony, not either of them, or to look upon their testimony with suspicion merely because they are defendants in this cause, and that if you have no other reason to disbelieve them than the fact that they are the defendants, then you must believe their testimony to be the truth.

158 Miss. at 127, 130 So. at 114.

The court in *Conn* found that the holding in *Thompson* had been modified by Coleman v. State, 22 So. 2d 410 (1945). 205 Miss. at 170, 38 So. 2d at 698.

In *Coleman* the court held that a defendant was entitled to an instruction which stated that he was a competent witness whose testimony the jury should not disbelieve merely because he was the defendant, and that his testimony was entitled to whatever weight the jury might give. 22 So. 2d at 410-11. The supreme court held that the instruction was properly refused, however, since the lower court had commented on the weight of the testimony by stating that "it is your duty to believe every word she said while so testifying." *Id.* at 411; *accord*, Clark v. State, 39 So. 2d 783, 784 (instruction that jury must believe defendant correctly denied), *suggestion of error overruled*, 206 Miss. 701, 40 So. 2d 591 (1949).

[177] 205 Miss. at 170, 38 So. 2d at 698.

[178] *See* note 175 *supra*.

the prosecution's case is based solely upon circumstantial evidence, this type of instruction has been permitted.[179] In *Dunbar v. State,*[180] the prosecution's evidence was purely circumstantial.[181] Thus, the court concluded that the defendant was entitled to an instruction that his testimony should be given the same weight as any other witness's testimony.[182] In the 1980 case of *Gray v. State,*[183] the court continued to follow the general rule, holding that a jury instruction similar to the one in *Dunbar* was properly refused because the prosecution's evidence was not purely circumstantial.[184]

With this background, the Mississippi Supreme Court was asked to rule on the instruction in *Baker v. State* in 1980.[185] In *Baker,* the defendant was denied an instruction "that under the law the defendant, Keith Baker, is a competent witness in his own behalf."[186] Since the state's case was not based on circumstantial evidence, the court concluded that he was not entitled to the instruction.[187] The court also noted that the defendant was a competent witness by statute, and had he not been a competent witness, he would not have been permitted to testify. Therefore, there was no reason to instruct the jury on the competency of any witness.[188]

The Supreme Court in *Baker* stated that it was overruling all cases cited in the opinion[189] which were contrary to the court's conclusion.

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[179] Gray v. State, 387 So. 2d 101, 103-04 (Miss. 1980).

[180] 159 Miss. 603, 132 So. 748 (1931).

[181] *Id.* at 606-09, 132 So. at 748-49.

[182] *Id.* at 609, 132 So. at 749.

[183] 387 So. 2d 101 (Miss. 1980).

[184] *Id.* at 103-04; *see* Phillips v. State, 374 So. 2d 824, 826 (Miss. 1979) (jury instruction on weight of defendant's testimony allowed only where evidence is circumstantial); McNamee v. State, 313 So. 2d 392, 395 (Miss. 1975) (jury instruction on weight of defendant's testimony properly refused because it would place undue emphasis on defendant's testimony).

[185] 391 So. 2d 1010 (Miss. 1980).

[186] *Id.* at 1010.

[187] *Id.* at 1011.

[188] *Id.* at 1012.

[189] Cases cited within the court's opinion include several cases discussed earlier in the section: *Gray v. State, Conn v. State, Dunbar v. State,* and *McVay v. State.* Other cases cited include: Phillips v. State, 374 So. 2d 824, 826 (Miss. 1976) (instruction on weight of defendant's testimony permitted only where evidence is circumstantial); McNamee v. State, 313 So. 2d 392, 395 (Miss. 1975) (jury instruction on weight of defendant's testimony places undue emphasis on defendant's testimony as evidence); Clark v. State, 39 So. 2d 783, 784 (instruction that jury must believe defendant correctly denied), *suggestion of error overruled,* 206 Miss. 701, 40 So. 2d 591 (1949); Parret v. State, 205 Miss. 651, 653, 39 So. 2d 272, 272 (1949) (instruction improper which stated that if there were no other reasons to disbelieve defendant's testimony than the fact he was defen-

The court did not, however, list the cases it considered to be in direct conflict.[190] Cases which permitted an instruction stating that the defendant was competent to testify as a witness[191] were definitely overruled. But it is unclear whether such an instruction is still permissible where the prosecution's case is based solely upon circumstantial evidence.

F. The Mississippi Habitual Criminal Statutes

To deal with the problem of recidivism,[192] the habitual criminal statutes increase the penalty for a felony when the defendant has been convicted twice previously of any felony.[193] Four primary justifications for recidivist statutes were recognized by Chief Justice Warren in

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dant, his testimony should be believed); Coleman v. State, 198 Miss. 519, 522, 22 So. 2d 410, 411 (1945) (instruction improper which stated that it was the jury's duty to believe every word the defendant said while testifying); Thompson v. State, 158 Miss. 121, 127, 130 So. 112, 114 (1930) (instruction on the competency of the defendant as a witness proper); Murphy v. State, 119 Miss. 220, 226-27, 80 So. 636, 636-37 (1919) (instruction stating that defendant's testimony was entitled to the same consideration as that of any other witness found to be proper); Vails v. State, 94 Miss. 365, 369, 48 So. 725, 726 (1908) (error in instruction by state cured by error in instruction by defendant).

[190] *See* 391 So. 2d at 1011-12.

[191] Two such cases are: Conn v. State, 205 Miss. at 170, 38 So. 2d at 698; McVay v. State, 26 So. at 947.

[192] *See* "Careers in Crime," a statistical survey collected in U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES—1965, at 27 (1966). The survey revealed that 62% of prisoners sentenced to federal prisons in the year ending June 30, 1965, had been sentenced previously.

[193] Sections 99-19-81 to -83 will be referred to as the habitual criminal statutes. MISS. CODE ANN. § 99-19-81 (Supp. 1980) provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, shall be sentenced to the maximum term of imprisonment prescribed for such felony, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

MISS. CODE ANN. § 99-19-83 (Supp. 1980) provides:

> Every person convicted in this state of a felony who shall have been convicted twice previously of any felony or federal crime upon charges separately brought and arising out of separate incidents at different times and who shall have been sentenced to and served separate terms of one (1) year or more in any state and/or federal penal institution, whether in this state or elsewhere, and where any one (1) of such felonies shall have been a crime of violence shall be sentenced to life imprisonment, and such sentence shall not be reduced or suspended nor shall such person be eligible for parole or probation.

Spencer v. Texas:[194] "A man's prior crimes are thought to aggravate his guilt for subsequent crimes, and thus greater than usual retribution is warranted. Similarly, the policies of insulating society from persons whose past conduct indicates their propensity to criminal behavior, of providing deterrence from future crime, and of rehabilitating criminals are all theoretically served by enhanced punishment . . . ."[195]

The habitual criminal statutes should not be confused with successive offense statutes which increase the penalty for an offense where the defendant has a prior conviction under the same statute.[196] While there are several requirements applicable to all habitual offender statutes,[197] there are procedural differences.[198]

In order for a prior conviction to be used to enhance the punishment for a present offense, the prior conviction must be final, valid, and alleged sufficiently in the indictment.[199] Finality refers to the ultimate determination of the defendant's guilt or innocence. Therefore, when a conviction in a lower court is appealed, the conviction does not become final until the reviewing court disposes of the case.[200] If a conviction is reversed on appeal, it cannot be used as a prior conviction within the meaning of habitual offender statutes.[201]

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[194] 385 U.S. 554, 569 (1967) (Warren, C.J., dissenting and concurring in part).

[195] *Id.* at 571.

[196] *E.g.*, MISS. CODE ANN. § 41-29-147 (Supp. 1980) (controlled substances statutes); *id.* § 97-23-47(2) (shoplifting offenses); *id.* § 97-37-1(b), (c), & (d) (1972) (carrying a concealed weapon); *id.* § 97-31-27 (1972) (illegal sale or possession of intoxicating beverages).

[197] *See* notes 199 through 201, 213, 214, 217 & 218 and accompanying text *infra*. The term "habitual offender statutes" refers to recidivist statutes in general.

[198] For example, to charge a defendant with successive violations of the same statute, the indictment must allege that the defendant was tried and convicted previously as a first offender and then as a second offender. *See* Burnett v. State, 285 So. 2d 783, 785-86 (Miss. 1973) (prosecution as a third offender improper where indictment alleged defendant was convicted three times previously for shoplifting, but did not allege he had been convicted for a second offense); White v. State, 214 Miss. 235, 239-40, 58 So. 2d 510, 511 (1952) (allegation that defendant committed two prior offenses insufficient to charge him as third offender, because without allegation of convictions as a first and second offender, prior convictions were treated as first offenses). Under the habitual criminal statutes, however, the charge is sufficient if it is alleged that the defendant has committed two prior felonies. *See* Jordan v. State, 383 So. 2d 495, 497 (Miss. 1980) (for habitual criminal statutes to apply a person must have been convicted previously of two felonies). Another distinction between the habitual criminal statutes and the successive offense statutes involves the introduction of the prior convictions to the jury. Under the successive offense statutes, the state must charge and prove in its case in chief a defendant's prior convictions. *See* Branning v. State, 224 So. 2d 579, 582 (Miss. 1969) (convictions must be charged and proved; not error to prove prior convictions before guilt established). In contrast rule 6.04 of the MISS. UNIFORM R. CIR. CT. P. mandates that trials under the habitual criminal statutes be bifurcated. Except for impeachment purposes, evidence of a defendant's prior convictions are admissible only after the adjudication of guilt. A third difference between the two types of statutes relates to the chronological sequence of the prior convictions and the crime for which the defendant is charged as a habitual offender. *See* notes 239 through 243 and accompanying text *infra*.

[199] *See* Lay v. State, 310 So. 2d 908, 910 (Miss. 1975) (indictment must include pre-

In *Jackson v. State*,[202] the Mississippi Supreme Court addressed the issue of whether a conviction which results in probation or suspended sentence[203] constitutes a final conviction within the purview of section 99-19-81 of the Mississippi Code.[204] The defendant in *Jackson* argued that "the conjunctive phrasing 'and who shall have been sentenced . . . ' evidence[d] a legislative intent to include within the class of habitual offenders only those who have been twice convicted of distinct felonies for which penitentiary terms have not only been pronounced as punishment, but also served through actual incarceration."[205]

In rejecting the defendant's argument, the supreme court emphasized that the purpose of the habitual criminal statutes is "to cure the evil of recidivism."[206] The language of the statutes requires only that a defendant have two distinct prior felony convictions for which separate sentences of one year or more were ordered.[207] The statutes are con-

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vious charge); *cf.* Williams v. State, 125 Miss. 347, 355, 87 So. 672, 673 (1921) (absence of order or judgment from circuit court causes prior conviction not to be final so that present conviction treated as first offense). *See generally* Annot., 5 A.L.R.2d 1080 (1949) (discussing what constitutes prior "conviction" within meaning of statute enhancing penalty for second or subsequent offense).

[200] *See* Williams v. State, 125 Miss. 347, 354-55, 87 So. 672, 673 (1921) (case appealed to a higher court was still pending in the absence of an order or judgment appearing on the court's record).

[201] *See* United States v. Bowdach, 561 F.2d 1160, 1175 (5th Cir. 1977) (convictions overturned on appeal could not be used as prior convictions to enhance punishment under the recidivist provision of the dangerous special offender statute, 18 U.S.C. § 3575(e)(1) (1976)).

[202] 381 So. 2d 1040 (Miss. 1980).

[203] The defendant objected to the use of a prior conviction of burglary/larceny and possession of a controlled substance in Alabama. He was sentenced to three years on each count; however, probation was granted with suspension of the three year sentences. *Id.* at 1042.

[204] *Id.* The defendant did not attack the use of prior convictions obtained in another state since the habitual criminal statutes provide specifically that convictions in any state or federal court may be used. MISS. CODE ANN. §§ 99-19-81, -83 (Supp. 1980); *see* Norton, *Gideon and the Habitual Criminal Statutes,* 6 WASHBURN L.J. 24, 33-35 (1966-1967) (full faith and credit given to convictions obtained in other jurisdictions).

[205] 381 So. 2d at 1042.

[206] *Id.*

[207] *Id.*

cerned with the defendant's previous delinquent conduct, not with whether the trial court thought rehabilitative prospects warranted probation and a suspended sentence.[208] Therefore, the supreme court held that the trial court's order, which sentenced the defendant to three years in prison, was final, even though the defendant was released subsequently and never served time in prison.[209]

Prior convictions which are used to enhance punishment must be valid, as well. The leading case involving the requirement of validity is *United States v. Tucker*.[210] In *Tucker*, the defendant was convicted of armed robbery by a federal district court.[211] In determining the sentence, the district court specifically considered the defendant's three previous felony convictions.[212] It was determined later that two of the convictions had been obtained unconstitutionally because the defendant was not represented by counsel.[213] The Supreme Court in *Tucker* held that convictions obtained in violation of the United States Constitution may not be used to enhance punishment,[214] and reversed the district court's sentence.[215]

Also, for the habitual offender statutes to be used to enhance punishment, the allegations in the indictment must be sufficient.[216] In addition to alleging the statute under which enhanced punishment is sought,[217] "the indictment must allege with particularity the state or federal jurisdiction of the previous conviction, the date of the judgment and the nature or description of the offense constituting the previous felony."[218] In 1979, the Mississippi Supreme Court adopted the Mississippi Uniform Criminal Rules of Circuit Court Practice and prescribed the above requirements in rule 6.04(1).[219] Rule 6.04 also set

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[208] *Id. See generally* Annot., 31 A.L.R.2d 1186 (1953) (discussing effect of pardon on court's consideration of earlier conviction in applying habitual criminal statute).

[209] The supreme court reviewed the record of the Alabama trial court to determine what final sentence was imposed. The record revealed that the defendant was sentenced to three years in the state penitentiary. At the bottom of the same page in the record, an addendum acknowledged the defendant's application for probation. 381 So. 2d at 1042.

[210] 404 U.S. 443 (1972); *see* Burgett v. Texas, 389 U.S. 109, 115 (1967) (prior invalid criminal convictions are not admissible); Chambers v. Florida, 309 U.S. 227, 228 (1940) (convictions by coerced confessions are void).

[211] Tucker v. United States, 299 F. Supp. 1376, 1379 (N.D. Cal. 1969).

[212] 404 U.S. at 444. Two prior convictions were obtained in Florida and one prior conviction was obtained in Louisiana. *Id.*

[213] *Id.* at 444-45. In Gideon v. Wainwright, 372 U.S. 335 (1963), the United States Supreme Court declared that it was unconstitutional to prosecute a defendant for a felony in state court unless he was represented by an attorney or had waived his right to an attorney. *Id.* at 343-45.

[214] 404 U.S. at 449; *see* Craig v. Beto, 458 F.2d 1131, 1136 (5th Cir. 1972) (case reversed and remanded to redetermine sentence where constitutionally invalid convictions were used to enhance punishment); Brown v. State, 222 Miss. 863, 870-71, 77 So. 2d 694, 696-97 (1955) (conviction relied on to sentence defendant as second offender insufficient); *cf.* Trivillion v. State, 195 Miss. 308, 310, 15 So. 2d 285, 285 (1943) ("conviction as a second offender under the [intoxicating liquor statute] may not be predicated upon a prior conviction under an ordinance").

[215] 404 U.S. at 449.

[216] *See* Burnett v. State, 285 So. 2d 783, 784 (Miss. 1973) (indictment must allege that defendant was convicted of second offense before a third offense may be charged);

Ladnier v. State, 273 So. 2d 169, 174 (Miss. 1973) (indictment must charge previous conviction for defendant to be charged as second offender); Branning v. State, 224 So. 2d 579, 582 (Miss. 1969) (indictment must charge previous convictions to find defendant a habitual offender).

[217] Bell v. State, 355 So. 2d 1106, 1108 (Miss. 1978) (to enhance punishment under the habitual criminal statute, the statute must be alleged in the indictment); *see* Jordan v. State, 383 So. 2d 495, 496 (Miss. 1980) (indictment charged defendant under the habitual criminal statute § 99-19-81); Usry v. State, 378 So. 2d 635, 637 (Miss. 1979) (same). Similarly, under the successive offense statutes, the indictment must allege that the prior convictions were under the same statute. *See* Burns v. State, 344 So. 2d 1189, 1191 (Miss. 1977) (must charge defendant as a second offender under the controlled substances statutes to seek punishment as a repeat offender); McGowan v. State, 269 So. 2d 645, 649 (Miss. 1972) (indictment must make specific and express reference to the intoxicating liquor statute); Barnes v. State, 239 Miss. 756, 758, 125 So. 2d 293, 293 (1960) (indictment must refer specifically to the statute involved to charge validly a third offense under the intoxicating liquor statute); Rogers v. State, 198 Miss. 495, 498, 22 So. 2d 550, 551 (1945) (specific reference to the statute required).

[218] Usry v. State, 378 So. 2d 635, 637 (Miss. 1979) (quoting Lay v. State, 310 So. 2d 908, 910 (Miss. 1975)) (indictment which "failed to set forth the jurisdiction in which the previous convictions were obtained and the nature or description of the offenses constituting the previous convictions" was insufficient to charge defendant as a second offender under the controlled substances statute); Watson v. State, 291 So. 2d 741, 743 (Miss. 1974) (indictment defective because it did not allege prior convictions with particularity and specificity required); Brewsaw v. State, 168 Miss. 371, 375, 151 So. 475, 476 (1933) (indictment insufficient to charge defendant as third time offender under intoxicating liquor statute because it did not allege that prior convictions were under same statute, court or courts in which the convictions took place, and date of convictions). *See also* Annot., 80 A.L.R.2d 1196 (1968) (form and sufficiency of allegations of time, place, and court of prior offenses or convictions under habitual criminal act or statute enhancing punishment for repeated offenses).

In Jones v. State, 383 So. 2d 498, 500 (Miss. 1980), the defendant was charged and convicted under MISS. CODE ANN. § 97-37-1 (1972) as a second offender for carrying a concealed weapon. On appeal, he attacked the sufficiency of the indictment to charge him as a second offender. The indictment failed to state in which judicial district of Hinds County the conviction took place, but the court held that this defect was a formal one and could be amended. Therefore, the indictment was not fatally defective and the conviction and sentence were affirmed. 383 So. 2d at 500.

[219] MISS. UNIFORM CRIM. R. CIR. CT. P. 6.04 provides:

> In cases involving enhanced punishment for subsequent offenses under the Habitual Criminal Statute, MISS. CODE ANN. § 99-19-83 (Supp. 1978):

forth strict guidelines which are to be followed by the trial court to prevent the jury from gaining knowledge of the defendant's previous convictions prior to the determination of guilt.[220] On its face, rule 6.04 applies to actions under Mississippi Code section 99-19-83 only; however, in *Usry v. State*[221] the supreme court announced that rule 6.04 applies also to cases in which enhanced punishment is sought under section 99-19-81.[222]

There are two irreconcilable lines of cases in Mississippi concerning the scope of remand when a case is reversed on the ground that the

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(1) The indictment must include both the principal charge and a charge of previous convictions. The indictment must allege with particularity the nature or description of the offense constituting the previous felonies, the state or federal jurisdiction of previous conviction, and the date of judgment. The indictment shall not be read to the jury.

(2) Separate trials shall be held on the principal charge and on the charge of previous convictions. In the trial on the principal charge, the previous convictions will not be mentioned by the state or the court except for impeachment purposes.

(3) If the defendant is convicted on the principal charge, a hearing before the court will then be conducted on the previous convictions.

[220] Rule 6.04 prohibits the reading to the jury of the habitual criminal charge in the indictment. It also provides that any trial under MISS. CODE ANN. §§ 99-19-81 to -83 must be held in two stages. The first stage is to determine the accused's guilt under the principal charge; the second stage is to determine the validity of the previous convictions and to impose a sentence. *See* Davis v. State, 377 So. 2d 1076, 1079-80 (Miss. 1979) (ordering trial courts to follow rule 6.04); Note, *"Defective Delinquent" and Habitual Criminal Statutes—Required Constitutional Safeguards,* 20 RUTGERS L. REV. 756, 772 (1965-1966) (bifurcating a criminal trial into a guilt determining phase and a sentencing phase does not constitute double jeopardy); Annot., 82 A.L.R. 341, 363 (1933) (procedure in habitual criminal statute should be strictly pursued). The best proof of a former conviction is the judgment of conviction. *See* McGowan v. State, 269 So. 2d 645, 649 (Miss. 1972) (indictment under habitual criminal statute must refer specifically to statute under which defendant was convicted previously); Brown v. State, 222 Miss. 863, 870, 77 So. 2d 694, 696 (1955) (guilty plea alone not proof of conviction). To make a prima facie identification of the defendant as the person convicted previously, it is necessary only to show that the names are the same. The defendant is entitled to attack this presumption of identity through rebuttal testimony. To make its case easier, the state could introduce descriptive data of the person convicted previously. *See* Branning v. State, 224 So. 2d 579, 582 (Miss. 1969) (jury is entitled to instruction on presumption of identity of the defendant as the person convicted previously where names are identical); Goldsby v. State, 240 Miss. 647, 674, 123 So. 2d 429, 439 (1960) (defendant's contention that there was no proof of identity was meritless where the names were the same, descriptive data was introduced, and defendant failed to rebut the evidence), *cert. denied,* 365 U.S. 861 (1961); Annot., 11 A.L.R.2d 870, 875-96 (evidence of identity in case of prior conviction required for purpose of enhanced punishment).

[221] 378 So. 2d 635 (Miss. 1979).

[222] *Id.* at 639.

indictment was insufficient to charge the defendant as a habitual criminal.[223] One line of cases holds that the entire case must be reversed and the defendant held for further action by the grand jury.[224] The rationale underlying this viewpoint is that the evidence of prior convictions is highly prejudicial and therefore, was admitted improperly at the trial.[225] In recent cases, however, the trend has been to remand the case for resentencing only.[226] The justification for remanding solely for retrial of the sentencing phase has varied. The court has indicated that where the defendant fails to demur to the indictment[227] or fails to object to the state's introduction of prior convictions in its case in chief it is not error for the court to admit prior convictions into evidence,[228] but they may be considered in determining the sentence. The court has also reversed for resentencing only when the evidence of guilt has been uncontradicted and overwhelming.[229] In another case the supreme court held that the improper admission of prior convictions in the state's case in chief[230] did not require a complete reversal because the jury was instructed not to use the prior convictions as evidence of guilt.[231]

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[223] *See* Lay v. State, 310 So. 2d 908, 913-14 (Miss. 1975) (cases can be remanded for resentencing only, or for further action by grand jury).

[224] *See* Watson v. State, 291 So. 2d 741, 744 (Miss. 1974) (reversed and remanded and defendant held for further action by the grand jury); Burnett v. State, 285 So. 2d 783, 784-86 (Miss. 1973) (judgment and sentence were reversed); McGowan v. State, 269 So. 2d 645, 649 (Miss. 1972) (reversed and remanded to await the further action of the grand jury); Ainsworth v. State, 206 Miss. 559, 567-68, 40 So. 2d 298, 301 (1949) (defendant held for further action by the grand jury); Riley v. State, 204 Miss. 562, 566-67, 37 So. 2d 768, 769 (1948) (reversed and remanded for further action by grand jury); Rogers v. State, 198 Miss. 495, 498-99, 22 So. 2d 550, 551 (1945) (because of defects in the indictment the case was reversed and remanded for a new trial); Trivillion v. State, 195 Miss. 308, 310, 15 So. 2d 285, 285 (1943) (indictment insufficient; defendant entitled to be tried only upon a proper charge and, if convicted, sentenced in accordance therewith). *But see* White v. State, 214 Miss. 235, 239, 58 So. 2d 510, 511 (1952) (grand jury indictment insufficient to charge as third offender; however, since defendant pled guilty, court remanded for sentencing only).

[225] In Brown v. State, 222 Miss. 863, 871, 77 So. 2d 694, 696-97 (1955), the court quoted with approval the concurring opinion in Millwood v. State, 190 Miss. 750, 758, 1 So. 2d 582, 584 (1941) (Alexander, J., concurring):

> [I]t is apparent that if the defendant is considered as having been convicted of a constituent misdemeanor it will be seen that he was convicted upon testimony which was inadmissible and highly prejudicial. Two former convictions for the sale of intoxicating liquor were proved by the state. Regardless of how appropriate such evidence would be in a proper prosecution under paragraph (c), it was so improper and prejudicial under a prosecution as for a first offense that this Court ought to take notice thereof.

222 Miss. at 871, 77 So. 2d at 696-97.

[226] These cases contain the common elements that (1) the indictments were sufficient with respect to the primary charges, but the habitual criminal charges were inadequate; and (2) the guilt and sentencing stages of the trials were held in a single stage. *See, e.g.,* Usry v. State, 378 So. 2d 635, 638-39 (Miss. 1979); Davis v. State, 377 So. 2d 1076, 1079 (Miss. 1979); Bell v. State, 355 So. 2d 1106, 1107-08 (Miss. 1978); Lay v. State, 310 So. 2d 908, 912-14 (Miss. 1975).

[227] Lay v. State, 310 So. 2d 908 (Miss. 1975). The defendant argued that since the indictment was defective as to the habitual criminal charge, the state could not introduce prior convictions in its case in chief. Because such evidence was introduced and was prejudicial, the defendant maintained that the conviction must be reversed. The supreme court stated that the defendant should have attacked the sufficiency of the indict-

In a related case, *Nettles v. State,*[232] the defendant maintained that the failure of the court, on its own motion, to instruct the jury not to consider past convictions as evidence of the substantive crime vio-

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ment by a demurrer. Absent either a demurrer or specific objections to the evidence, the prior convictions were properly admitted. *Id.* at 912.

[228] *Id.* at 912-14. Not only did the defendant in *Lay* fail to demur to the indictment, he also failed to make any specific objections to the evidence of prior convictions. Concerning the general objection made by the defendant to the state's exhibits, the court said that where part of the evidence is admissible and part is not, a specific objection must be made to the inadmissible part. A general objection to the whole is insufficient. *Id.* Evidence of prior convictions may not be used, however, to enhance punishment under a successive offense statute. *See* Gray v. State, 351 So. 2d 1342, 1345 (Miss. 1977) (proof of crime distinct from that alleged in indictment is not admissible against accused except where offense charged and that offered to be proved are so connected as to constitute one transaction or where it is necessary to identify defendant or prove motive), *cert. denied,* 446 U.S. 988 (1980). In *Lay,* the defendant was charged as a second offender under the Mississippi Caustic Poison Law of 1930, Miss. Code Ann. § 41-29-147 (Supp. 1980). The *Lay* decision was the first case under a habitual criminal statute reversed and remanded for resentencing only. The court reasoned that remanding for resentencing "relieves Lay (the defendant) from enhanced punishment and obviates the necessity of his former conviction being ratified by another jury." 310 So. 2d at 914.

[229] In Bell v. State, 355 So. 2d 1106, 1107 (Miss. 1978), the defendant was tried as a habitual offender under Miss. Code Ann. § 99-19-81 (Supp. 1980). The court held that since the indictment did not include a habitual criminal charge the sentence was void. The court remanded only for resentencing since the evidence of the defendant's guilt was so overwhelming. 355 So. 2d at 1107-08.

[230] In Davis v. State, 377 So. 2d 1076, 1079 (Miss. 1979), the defendant was charged as a habitual criminal under the Sentencing of Habitual Criminals Statute, Miss. Code Ann. § 99-19-83 (Supp. 1980). During the single stage trial, the state introduced the defendant's prior convictions in its case in chief. The defendant claimed that the state's purpose was to raise a " 'forbidden inferential sequence' of specific instances of bad conduct/bad character/probable conforming conduct on the occasion in question, ..." 377 So. 2d at 1079.

[231] *Id.* at 1079-80. The court reasoned that since the defendant was being tried under a habitual criminal statute and a cautionary instruction was given to the jury, remanding for resentencing was not improper. *Id.*

[232] 380 So. 2d 246 (Miss. 1980).

lated the defendant's rights under the due process clause.[233] The determination of the defendant's guilt and the imposition of a sentence were adjudicated in a single trial. Guided by the United States Supreme Court's decision in *Kentucky v. Whorton*,[234] the Mississippi court stated that the resolution of the defendant's contention called for an evaluation of the trial court's failure to give a limiting instruction in light of the totality of the circumstances.[235] The court ruled that if the facts indicated the trial court committed plain error, then the conviction must be reversed.[236] The court's examination revealed that the defense attorney deliberately failed to request a cautionary instruction regarding the limited consideration to be given the prior convictions.[237] Therefore, the court affirmed the conviction and sentence.

The Mississippi Supreme Court in 1980 also addressed the issue of the chronological or procedural sequence of former convictions in relation to the habitual criminal charge. In *Jordan v. State*,[238] two of the prior convictions used to enhance punishment under section 99-19-81 occurred after the commission of the crime for which the defendant was being tried.[239] The defendant claimed that the use of these prior convictions was contrary to the statutory language that he must "have been convicted twice previously" of distinct felonies.[240] To support his contention, the defendant cited cases interpreting the intoxicating liquor statute.[241]

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[233] *Id.* at 247. The indictment charged the defendant in *Nettles* under the habitual criminal statute, MISS. CODE ANN. § 99-19-83 (Supp. 1980). The defendant neglected to request a cautionary instruction. On appeal, he insisted that the trial court should have given the instruction on its own motion to protect his constitutional rights. When confronted with the court's decision in Newell v. State, 308 So. 2d 71, 73-74 (Miss. 1975) (court may give instructions on its own motion, but would not be reversed if it failed to give an instruction which was not specifically requested in writing), the defendant argued that his right to have the jury instructed on the constitutional issue should limit the discretion of the trial court. 380 So. 2d at 247.

[234] 441 U.S. 786, 789-90 (1979) (instruction on presumption of innocence in criminal case is not constitutionally indispensable).

[235] 380 So. 2d at 247. Circumstances which the court should consider include: "All the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming, and other relevant factors . . . ." *Id.* (quoting Kentucky v. Whorton, 441 U.S. 786, 789 (1979)).

[236] 380 So. 2d at 247. " 'Plain error appears only when the impeaching testimony is extremely damaging, the need for the instruction is obvious, and the failure to give it is so prejudicial as to affect the substantial rights of the accused.' " *Id.* at 248 (quoting United States v. Barnes, 586 F.2d 1052, 1058 (5th Cir. 1978)).

[237] 380 So. 2d at 248. The court speculated that the failure to request the cautionary instruction was a defense tactic used to minimize the effect of the prior convictions on the jurors' minds. *Id.*

[238] 383 So. 2d 495 (Miss. 1980). In accordance with rule 6.04, the trial was held in two stages, a guilt-determining phase and a sentencing phase. *Id.* at 496.

[239] The defendant had three previous felony convictions—one on February 1, 1973, and two on March 19, 1979. He was indicted by the grand jury on May 4, 1979, for a crime committed on September 29, 1978 and was charged as a habitual criminal under

The supreme court distinguished section 99-19-81 from statutes which enhance punishment for successive violations of the same statute. Under the habitual criminal statutes, there is no requirement that the prior convictions antedate the commission of the crime for which enhanced punishment is sought.[242] The habitual criminal statutes expressly provide that a person who has been convicted previously of two

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Miss. Code Ann. § 99-19-81 (Supp. 1980). 383 So. 2d at 496.

[240] The first premise in defendant's argument was that the statute was silent on whether his previous convictions must have occurred prior to commission of the crime for which he was being charged. 383 So. 2d at 497.

[241] *Id.* The defendant relied on Miles v. State, 51 So. 2d 214 (Miss. 1951), in which the court stated that under the intoxicating liquor statute, Miss. Code Ann. § 2613 (1942) (current version at § 97-31-27 (1972)), the "second offense . . . must have been committed after conviction of the prior offense, and a third offense after conviction of a second offense." 51 So. 2d at 215; *see* Rogers v. State, 198 Miss. 495, 498, 22 So. 2d 550, 550-51 (1945) (conviction reversed where indictment failed to allege second conviction was on a charge of having intoxicating liquor in defendant's possession after a former conviction); Millwood v. State, 190 Miss. 750, 755, 1 So. 2d 582, 583 (1941) (to charge defendant as a second offender, subsequent offense must have been committed after the first conviction).

[242] 383 So. 2d at 497. Thus, all prior felony convictions existing at the time of a subsequent sentencing may be used to enhance punishment under the habitual criminal statutes. *Id.* The same conclusion was reached in Jones v. State, 381 So. 2d 983 (Miss. 1980), regarding the use of prior convictions under Miss. Code Ann. § 99-19-101 (Supp. 1980). During the sentencing phase of the trial for capital murder, the court permitted the state to introduce defendant's previous conviction of armed robbery as an aggravating circumstance under § 99-19-191(5)(b). The prior armed robbery conviction was related to the same facts involved in the capital murder charge. The prior conviction was entered after the murder incident, but before defendant's trial for capital murder. The defendant contended that only convictions obtained prior to the murder incident for which he was currently being tried were admissible as aggravating circumstances. 381 So. 2d at 994.

In making its determination, the court looked to the legislative intent behind the enactment of subsection (5)(b). A sentencing jury performing its duty is required to balance the mitigating circumstances offered by a defendant against the aggravating circumstances presented by the state. The court noted that the restrictions placed upon what may be offered as mitigating circumstances were less stringent than restrictions placed upon the introduction of aggravating circumstances. Moreover, the objective of the sentencing phase is to determine "whether the most severe punishment will serve a legitimate social purpose untainted by vindictiveness." *Id.* The court concluded that the objective could be equitably attained by allowing into evidence favorable and unfavorable behavior occurring both prior to and after the time of the offense which is probative of a defendant's propensity to act in the future. *Id.*

felonies shall receive the maximum sentence allowable for his third felony.[243]

The supreme court's treatment of cases arising under the habitual criminal statutes evidences an inclusive approach to the use of prior convictions to enhance punishment. In both *Jackson v. State* and *Jordan v. State* there was authority contrary to the position adopted by the court.[244] Apparently, the court's liberal construction of the habitual criminal statutes is an attempt to abate the problem of recidivism. With the current high rate of recidivism, the court's punitive stance seems wise.

G. *Miscellaneous Decisions*

In 1980, the Mississippi Supreme Court handed down several other decisions in the criminal procedure area. Most of these cases simply reaffirmed well-established principles. Some, however, established new principles.

It is well-established that the Mississippi Supreme Court will not disturb a sentence imposed by a trial court if that sentence is within the limits of the statutes.[245] Certain sentences have been modified at the supreme court level, but only if the sentence imposed exceeded the limits set by the statute,[246] contained surplusage,[247] or the evidence indicated only a lesser included offense.[248]

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[243] 383 So. 2d at 497. *See also* Annot., 24 A.L.R.2d 1247 (1952) (effect of chronological or procedural sequence of former convictions on enhancement of penalty for subsequent offense under habitual criminal statutes).

[244] Regarding the court's holding in *Jackson,* see Annot., 5 A.L.R.2d 1080, 1086-88 (1949) (majority rule is that a prior deferred or suspended sentence is not a conviction within meaning of habitual criminal statutes). Regarding *Jordan,* see Annot., 24 A.L.R.2d 1247, 1249-52 (1952) (majority rule is that previous conviction must have been obtained prior to commission of offense on which second conviction was based).

[245] *E.g.,* Ainsworth v. State, 304 So. 2d 656, 658 (Miss. 1975); Boone v. State, 291 So. 2d 182, 187 (Miss. 1974); Crapps v. State, 221 So. 2d 722, 724 (Miss. 1969); Harris v. State, 142 Miss. 342, 344-45, 107 So. 372, 373 (1926).

[246] *See, e.g.,* Salter v. State, 387 So. 2d 81, 84 (Miss. 1980) (where statute provided for fine or imprisonment, it was error to impose both); Newburn v. State, 205 So. 2d 260, 264 (Miss. 1967) (12-year sentence reduced to 10 in accordance with statute); Williams v. City of Louisville, 153 Miss. 48, 49, 120 So. 571, 571 (1929) (fine reduced from $150 to $100 to conform with statute).

[247] *See, e.g.,* Hill v. State, 388 So. 2d 143, 146 (Miss. 1980) (court deleted the words "without probation or parole," since they lacked legal effect); Bullock v. State, 222 So. 2d 692, 693 (Miss. 1969) (court deleted larceny sentence since larceny had not been a substantive charge against defendant).

[248] *See, e.g.,* Morgan v. State, 388 So. 2d 495, 498 (Miss. 1980) (conviction for aggravated assault reversed and case remanded for trial on simple assault); Daniels v. State,

Obstensibly following this principle, the court in *Boyington v. State*[249] vacated the sentence imposed by the circuit court judge and remanded with instructions to that court to sentence Boyington to the sentence agreed to in plea bargaining.[250] Boyington was arrested for selling less than one kilogram of marijuana.[251] He was told that if he would serve as an informant, probation would be recommended.[252] For approximately six months, Boyington worked as an undercover informant, developing ten cases for the Mississippi Bureau of Narcotics.[253] The circuit judge declined to accept the probation recommendation, but agreed to accept a two year sentence.[254] Boyington refused the sentence. Upon conviction, the trial court imposed a sentence of eight years imprisonment.[255] This eight year sentence was within that prescribed by statute. The supreme court concluded, however, that justice required that Boyington be placed on probation because he, "with the knowledge of the trial court, worked for the Mississippi Bureau of Narcotics as an undercover informant, and was promised by the Bureau and the district attorney that they would recommend probation, which led appellant to believe he would be placed on probation, ..."[256] The court made no effort to distinguish other cases or to cite any authority for the change in its view. The court did indicate, however, that in the future an appellate review of all sentences may be required.[257]

Another area in which the Mississippi Supreme Court took a new position in 1980 is that of district attorneys' and county attorneys' duties. In *Daumer v. State*[258] the defendants, Daumer and Tuggle, were charged with the murder of Tuggle's young son.[259] On the defendants' motion, venue was changed from the Ninth Judicial District (Warren

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196 Miss. 328, 331, 17 So. 2d 793, 794 (1944) (conviction for assault with intent to murder affirmed as a conviction for simple assault and remanded for resentencing); Anthony v. State, 21 Miss. (13 S. & M.) 263, 265 (1850) (conviction for assault with express malice reduced to conviction for assault with implied malice, thereby negating death sentence).

[249] 389 So. 2d 485 (Miss. 1980).

[250] *Id.* at 491.

[251] *Id.* at 487.

[252] *Id.* at 487-88.

[253] *Id.* at 488.

[254] *Id.*

[255] *Id.* at 487.

[256] *Id.* at 491.

[257] The court said that "[i]t may become inevitable that justice will require appellate courts to review sentences less than capital." *Id.*

[258] 381 So. 2d 1014 (Miss. 1980).

[259] *Id.* at 1015.

County) to the Fourteenth Judicial District (Copiah County).[260] Defense counsel objected to the participation of the Warren County district attorney in the trial.[261] On appeal, the court found no error in the district attorney's participation, citing *State ex rel. Cowan v. State Highway Commission*[262] for the proposition that "[i]t is not perceived why one having authority to sue has not the right to resort to the venue where the suit must be brought."[263] The court further concluded that not only is it permissible for a district attorney to prosecute a suit in a district other than his own in such a situation, it is the duty of the district attorney to prosecute a case until the prosecution terminates.[264] The duties of a prosecutor are not ended by a mere change of venue.[265]

In 1980, the Mississippi Supreme Court held for the first time in *Coleman v. State*[266] that cocaine is a Schedule II controlled substance.[267] In *Coleman,* which involved a prosecution for the unlawful sale of cocaine,[268] the indictment charged that Coleman "did wilfully, unlawfully and feloniously sell cocaine . . . ."[269] The Mississippi Supreme Court held that there was no omission of substance rendering the indictment defective since cocaine has a well-defined meaning.[270] Furthermore, the court found that there is a necessary implication that cocaine is included in the definition of Section 41-29-115 which sets out Schedule II.[271] The implication arises from the specific inclusion in

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[260] *Id.*

[261] *Id.* at 1016.

[262] 195 Miss. 657, 13 So. 2d 614 (1943).

[263] 381 So. 2d 1014, 1016 (Miss. 1980) (quoting State *ex rel.* Cowan v. State Hwy. Comm'n, 195 Miss. 657, 675, 13 So. 2d 614, 616 (1943)).

[264] 381 So. 2d at 1016.

[265] *Id.*

[266] 388 So. 2d 157 (Miss. 1980).

[267] MISS. CODE ANN. § 41-29-115 (Supp. 1980) sets out Schedule II.

[268] 388 So. 2d at 157.

[269] *Id.* at 159.

[270] *Id.*

[271] The court relied on Bishop v. State, 568 S.W.2d 136 (Tex. Crim. App. 1978), which reached the same conclusion. The Texas statute in *Bishop* is identical to Mississippi's statute, except that the Texas statute omits the word "isomer." TEX. REV. CIV. STAT. ANN. art. 4476-15 (Vernon 1976). MISS. CODE ANN. § 41-29-115 (Supp. 1980) provides in part:

> The controlled substances listed in this section are included in Schedule II:
>
> Schedule II
>
> (a) Any of the following substances, except those narcotic drugs listed in other schedules, whether produced directly or indirectly by extraction from

the statute of compounds or derivatives of coca leaves and the specific exclusion of decocainized coca leaves or extractions.[272] An indictment which charges the sale of "cocaine" is sufficient to charge the sale of a Schedule II controlled substance.[273]

II. EVIDENCE: STATEMENTS AND CONFESSIONS

The United States Supreme Court's decision in *Miranda v. Arizona*[274] set forth new procedural requirements for taking statements and confessions from an accused in the custody of law enforcement officials.[275] Among these requirements is that an accused has the right to request the presence of an attorney when he makes a statement or confession.[276] If this *Miranda* right is violated, the voluntary statement or confession may not be used by the state against the defendant in its case in chief.[277] In *Harris v. New York*[278] and *Oregon v. Hass*,[279] the

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> substances of vegetable origin, or independently by means of chemical synthesis, or by combination of extraction and chemical synthesis:
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> . . . .
>
> (4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, isomer, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

[272] Coleman v. State, 388 So. 2d at 160 (quoting Bishop v. State, 568 S.W.2d at 137). The current statute's predecessor, MISS. CODE ANN. § 6845 (1942), stated that "cocaine" was included in the definition of "coca leaves." The court used this as an additional basis for its decision. 388 So. 2d at 160.

[273] 388 So. 2d at 160.

[274] 384 U.S. 436 (1966).

[275] *Id.* at 467. To protect the fifth amendment right against self-incrimination, a person in custody and subjected to interrogation must be informed that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult a lawyer and to have a lawyer present during questioning if he so desires, and that if he cannot afford a lawyer, one will be appointed to represent him. *Id.* at 467-73.

[276] *Id.* at 469-71.

> The presence of counsel at the interrogation may serve several . . . significant functions . . . . If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present the likelihood that the police will practice coercion is reduced, and if coercion is nevertheless exercised the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial.

Id. at 470.

[277] *Id.* at 479. The *Miranda* decision appeared to lay down a per se rule regarding

Supreme Court held, however, that a statement or confession, inadmissible in the state's case in chief, could be introduced as a prior inconsistent statement to impeach the defendant should he take the stand.[280]

The Mississippi Supreme Court, in *Day v. State*[281] followed the holding in *Harris* and *Hass*. In *Day*, the defendant requested an attorney prior to interrogation by state officers; he was not provided with an attorney, however, and the officers continued questioning him.[282] At trial, the defendant testified in his own behalf.[283] The trial court permitted the state to use the inculpatory statement made by the defendant during the interrogation to impeach his credibility.[284] The defendant contended that the use of the illegally obtained statement as impeaching evidence violated his constitutional rights under the fifth and fourteenth amendments as interpreted by *Miranda*.[285]

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the use of unconstitutionally obtained statements: "[N]o evidence obtained" in violation of the *Miranda* requirements "can be used against [the defendant]." *Id.*

[278] 401 U.S. 222, 224 (1971) (statement obtained from defendant without having informed him of his right to appointed counsel).

[279] 420 U.S. 714, 715 (1975) (inculpatory statements made by defendant after he requested an attorney).

[280] In both *Harris* and *Hass,* the Supreme Court's rationale for permitting the use of otherwise inadmissible statements was the same. Every witness who takes the stand places his character for truth and veracity into issue. A defendant in a criminal proceeding is no exception. Therefore, the state has at its disposal all the available truth-testing devices. The "shield provided by *Miranda* cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." Hass, 420 U.S. at 721-22 (quoting *Harris,* 401 U.S. at 225-26).

[281] 382 So. 2d 1071 (Miss. 1980).

[282] *Id.* at 1072. The defendant was arrested for armed robbery and was taken to the police station. After being read his *Miranda* rights, the defendant requested an attorney. The detectives ignored his request and continued to question him. The defendant then made an incriminating statement which the detectives contended was given freely and voluntarily. At trial, the defendant's motion to suppress the incriminating statement was sustained. *Id.*

[283] The defendant disclaimed any involvement in the robbery or any knowledge of the robbery until after its occurrence. *Id.*

[284] On cross-examination of the defendant, the state confronted the defendant with his statement to the detectives. The defendant denied having made the statement. Thus, a proper predicate was laid by the state to introduce the statement in rebuttal. The trial court admitted the statement for impeachment purposes only and gave a cautionary instruction to that effect. *Id.* at 1072.

[285] *Id.* at 1072-73. The defendant's reliance on *Miranda* was understandable:

> If, however, [defendant] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning.
>
> . . . [T]he right to have counsel present at the interrogation is indispensa-

The supreme court reviewed the record in search of evidence indicating that the statement was given voluntarily. Finding no coercion, duress, threats or promises of reward in the procurement of the statement,[286] the court held that the statement was admissible as impeaching evidence.[287] The defendant was entitled to an instruction that the

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> ble to the protection of the Fifth Amendment privilege under the system we delineate today . . . . Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.
>
> . . . .
>
> If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning.

Miranda v. Arizona, 384 U.S. at 444-45, 469-70, 474.

[286] 382 So. 2d at 1074. In *Harris* and *Hass* the Supreme Court stated that an illegally obtained statement could be used to impeach a defendant provided the statement met "the traditional standards [of] voluntariness and trustworthiness." *Hass,* 420 U.S. at 723. *See* Harris v. U.S., 401 U.S. 222, 224 (1971) (trustworthiness of evidence must meet legal standards). In Booker v. State, 326 So. 2d 791 (Miss. 1976), the Mississippi Supreme Court delineated the procedure to follow when a statement is made as a result of allegedly unconstitutional actions. If the defendant claims the statement was given involuntarily, the state has the burden of proving that the statement was not the result of coercion, duress, threats or promises of leniency. Should the state fail to meet its burden, the statement is neither admissible in the state's case in chief nor as a prior inconsistent statement to impeach the defendant. Also, if the statement is inadmissible due to a defective *Miranda* warning, the statement may not be admitted in the state's case in chief. The state may, however, use the statement to impeach the defendant "without first establishing that the confession [or statement] was freely and voluntarily given." *Id.* at 793.

In a recent decision, Parcell v. State, 389 So. 2d 1386 (Miss. 1980), the defendant mortally stabbed his girlfriend at a Jackson bus station. He fled the scene, went home, and attempted to commit suicide. He then telephoned the police and reported his attempted suicide, whereupon police arrived and took the defendant to the hospital by ambulance. After being advised of his *Miranda* rights, the defendant confessed to the stabbing. On appeal, the defendant contended that the confession was not free and voluntary because of the officer's conduct. He also argued that he had been misled by the officer who told him that his girlfriend was in "bad shape," when in fact she was dead. In addition, the defendant alleged that the officer had taken advantage of him by suggesting that he get "into a proper relation with God." In response to the defendant's allegations, the officer explained that at the time he responded to the defendant's inquiry concerning the victim's condition, he did not know that she was dead. Furthermore, the reference to spiritual guidance occurred after the defendant confessed. Based on these facts, the court ruled that the trial court correctly admitted the confession in the state's case in chief. *Id.* at 1388-89.

[287] 382 So. 2d at 1075. The court, pointing out that it was constrained to follow the Supreme Court's decisions in *Harris* and *Hass,* stated that it could not "impose greater

prior inconsistent statement could be used only in assessing his credibility as a witness and not as proof of guilt.[288]

The supreme court's ruling in *Day* was mandated by the *Harris* and *Hass* decisions.[289] The effect of *Day* is that there are now two standards governing the admissibility of a defendant's statement: one to determine admissibility in the state's case in chief and another to determine whether the statement may be used as impeaching evidence.[290]

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restrictions as a matter of Federal constitutional law, upon which this case [was] based, when the United States Supreme Court specifically refrains from imposing them, and should not do so as a matter of Mississippi law." *Id. See* Simmons v. State, 358 So. 2d 1324, 1325-26 (Miss. 1978) (state permitted to impeach defendant with statement allegedly taken in violation of defendant's *Miranda* right to an attorney).

[288] *Id.* In Murphy v. State, 336 So. 2d 213 (Miss. 1976), *cert. denied,* 429 U.S. 1076 (1977), the state introduced an otherwise inadmissible statement to impeach. The court held the defendant was entitled to an instruction limiting the use of the prior inconsistent statements as evidence pertaining only to the credibility of the witness. A defendant will receive such an instruction provided he requests it; it is not incumbent upon the trial court to give the instruction on its own motion. *Id.* at 216-17.

The dissent in *Day* argued that the effects of the *Miranda* warnings are eviscerated if interrogation continues after a defendant requests an attorney. It was maintained that statements obtained in this manner should be considered the result of coercion, and, therefore, neither admissible in the state's case in chief nor to impeach. 382 So. 2d at 1076-77 (Smith, J., dissenting). Justice Smith suggested that the warning should include a statement informing the accused that "although his request for an attorney is ignored and the interrogation continues unabated, if he makes a statement it can be used against him in evidence at his trial as an impeachment if he takes the stand." *Id.* at 1077 (Smith, J., dissenting).

It is clear from *Day* that a statement or confession obtained in violation of an accused's *Miranda* right to an attorney may be used as impeaching evidence. In Hammock v. State, 379 So. 2d 323 (Miss. 1980), a confession obtained after the defendant signed a form requesting that counsel be appointed to represent him, but before he was provided an attorney, was admissible in the state's case in chief. The form was signed by the defendant on August 24, and was stamped "filed" by the clerk on August 29. The defendant confessed to the crime on August 26. *Id.* at 324-25. Upon reviewing the record, the court ruled that the trial court was correct in finding that the defendant gave the confession freely and voluntarily with a full understanding of his rights and in admitting the confession into evidence. *Id.* at 326. The ruling remained unaffected by the defendant's request for appointed counsel. The court said it could not "assume a filing date earlier than that shown by the clerk's stamp, nor assume that the trial judge had knowledge of [the] petition prior to August 29 . . . the date on which he granted it, as there [was] nothing in the record to so indicate and no contention that he did." *Id.* The court also held that the defendant could not raise the argument that the confession was involuntary, because it was not preserved for appeal. The court stated that "in order to preserve the question on appeal, it was necessary to move to exclude the statement . . . ." *Id.* at 327.

[289] *See* note 287 *supra.*

[290] *See* 10 TULSA L.J. 697, 702 (1974-75) (discussion of the two standards); 24 VAND.

To use a statement as substantive evidence of guilt, the state must prove compliance with the *Miranda* requirements and voluntariness.[291] If the state fails to show that the *Miranda* requirements were met, it may still use the defendant's voluntary statement as impeaching evidence.[292]

In a subsequent case, *Cooley v. State*,[293] the Mississippi Supreme Court extended the rationale in *Day* and permitted the state to reveal the defendant's pretrial silence to impeach him. In *Cooley*, the defendant took the stand in his own behalf at his murder trial and testified for the first time that the shooting had been an accident.[294] On cross-examination, the prosecution asked the defendant if he had related his exculpatory account of the death to the police at the time of the arrest.[295] The defendant contended that the prosecution's reference to his pretrial silence violated his *Miranda* right to remain silent.[296]

Rejecting the defendant's contention, the supreme court noted that inconsistent statements are just one of the many available impeachment tools.[297] When it is suspected that a defendant's testimony is fabricated or perjured, the state may develop "facts and circum-

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L. Rev. 843, 849-50 (1970-71) (voluntariness determines admissibility of impeachment evidence).

[291] *See* note 286 *supra.*

[292] If the defendant attacks the voluntariness of the statement, the state must follow the procedure first announced in *Agee. See* note 330 *infra.*

[293] 391 So. 2d 614 (Miss. 1980) (en banc). Judge Smith, who wrote the dissent in *Day*, wrote the majority opinion in which four judges specially concurred.

[294] *Id.* at 616. The defendant's version of the shooting was highly improbable, without considering the reference to his silence at the time he surrendered to the police. Furthermore, even if his account was accepted as true, he nevertheless would have been guilty of murder. *Id.*

[295] *Id.* at 618. The defendant fled the scene after the shooting but turned himself in two hours later. At the time of his surrender, he neglected to tell the police that the shooting had been an accident. The court considered it incredible that at the time of his arrest the defendant failed to inform the police that the shooting had been accidental. After his arrest, the defendant was released on bail and remained free until his trial. During this period, he did not discuss the "accident" with any law enforcement officials. *Id.* at 618-19. The trial court permitted the prosecutor to elicit from the defendant the fact that until he took the stand in his own defense, no member of the police department had ever heard the defendant's story. *Id.* at 618.

[296] *Id.*

[297] *Id.* In McLendon v. State, 387 So. 2d 112, 115 (Miss. 1980), the court held that cross-examination questions about the circumstances surrounding defendant's arrest are permitted. Quoting 2 J. Wigmore, Evidence § 279 (3d ed. 1940), the court stated: "[I]t is today universally conceded that the fact of an accused's flight, escape from custody, resistance to arrest, concealment, assumption of a false name, and related conduct, are admissible as evidence of consciousness of guilt, and thus of guilt itself."

stances tending to show that it was untrue and a last minute fabrication."[298] The court concluded that the defendant's failure to make the exculpatory explanation when he was arrested was evidence which the jury was entitled to hear. Therefore, the defendant's pretrial silence could be used as impeaching evidence.[299]

Subsequent to the court's decision in *Cooley,* the United States Supreme Court held in *Jenkins v. Anderson*[300] that the use of pre-arrest silence to impeach a defendant's credibility did not violate either the fifth or the fourteenth amendments to the Constitution.[301]

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[298] 391 So. 2d at 618. *See* Bradley v. Jago, 594 F.2d 1100, 1103 (6th Cir. 1979) (defendant's failure to offer the exculpatory explanation when he had an earlier opportunity to do so is evidence which the jury is entitled to hear and from which it may draw reasonable inferences).

The *Cooley* decision places the defendant at a disadvantage since his silence may be used against him. Yet, if he had given an exculpatory statement he could be precluded from disclosing that fact to the jury. In Baugh v. State, 388 So. 2d 141 (Miss. 1980), the state filed a motion in limine to prevent defense counsel from inquiring on examination of any officer whether defendant made an exculpatory statement. The motion was granted. At trial, defense counsel attempted to elicit from an officer the fact that an exculpatory statement had been made. The trial court ruled that reference to the statement could not be made since its contents were not admissible. The supreme court affirmed the trial court: the exculpatory statement "was a self-serving declaration and was inadmissible. The statement being inadmissible as a matter of law, reference to the statement was also inadmissible." *Id.* at 142-43. *See* Cone v. State, 271 So. 2d 453, 455-56 (Miss. 1973) (exclusion of statement made by defendant which was not self-serving constituted fatal error).

[299] 391 So. 2d at 623. There were two specially concurring opinions in *Cooley.* Chief Justice Patterson agreed with the majority opinion, but only because the reference to the defendant's post-arrest silence was harmless error in light of the overwhelming evidence indicating the defendant's guilt. Justice Patterson thought that allowing the state to use a defendant's pretrial silence to impeach was a misapplication of the law. *Id.* at 625 (Patterson, C.J., specially concurring). The primary authority relied on by Justice Walker in the other concurring opinion was Doyle v. Ohio, 426 U.S. 610 (1976). In *Doyle* the United States Supreme Court held that when a defendant is informed of his right to remain silent and he chooses to exercise that right, his silence cannot be used for impeachment purposes. *Id.* at 618-20. Since the record failed to state that the defendant had received the *Miranda* warning at the time of his arrest, Justice Walker concluded that the impeachment did not violate the defendant's *Miranda* right to remain silent. 391 So. 2d at 624 (Walker, J., specially concurring). *See* Austin v. State, 384 So. 2d 600, 601 (Miss. 1980) (state may not comment in closing argument upon the absence of any pretrial statements by defendant).

[300] 447 U.S. 231 (1980).

[301] The facts in *Jenkins* were similar to those in *Cooley.* In *Jenkins,* the defendant was indicted for murder. At trial, he took the stand in his own defense and testified that the killing had been in self-defense. On cross-examination, the defendant said he failed to report the incident to law enforcement authorities until two weeks after the fatal incident. In closing argument, the prosecutor again called attention to the defendant's pre-

The Mississippi Supreme Court on petition for rehearing affirmed its earlier decision in *Cooley,* stating that its decision was clearly in accord with *Jenkins.*

Contrary to the well-reasoned opinion in *Day v. State,* the court struggled to find authority for its decision in *Cooley.* The United States Supreme Court in *Jenkins v. Anderson* approved only the use of pre-arrest silence to impeach. The Supreme Court in *Doyle v. Ohio*[302] had earlier prohibited the use of post-arrest silence to impeach when the defendant had received *Miranda* warnings at the time of his arrest.[303] Thus, the Court's decisions in *Jenkins* and *Doyle* leave only two possible instances in which impeachment by silence may be permitted: (1) silence before arrest and (2) silence at the time of or after arrest where no *Miranda* warning is given. The accused in *Cooley* did not give his exculpatory version of the shooting at the time of his surrender to the police. Thus, the silence confronted by the court in *Cooley* was not pre-arrest silence as in *Jenkins,* but silence at the time of and after arrest as in *Doyle.*[304] Also, Cooley had not been read his *Mi-*

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arrest silence. The defendant contended that "use of prearrest silence to impeach [his] credibility violate[d] either the Fifth or Fourteenth Amendment to the Constitution." *Id.* at 232.

The Court declared:

> [T]he Fifth Amendment guarantees an accused the right to remain silent during his criminal trial, and prevents the prosecution from commenting on the silence of a defendant who asserts the right . . . . In [*Jenkins*], of course, the [accused] did not remain silent throughout the criminal proceedings. Instead, he voluntarily took the witness stand in his own defense.

Id. at 235. Once a defendant takes the stand, he places his credibility in issue, and therefore is subject to impeachment. The use of pre-arrest silence is one method of impeaching the credibility of the witness. Before a defendant takes the stand, he should be aware that he is expected to testify fully. *Id.* at 235-36. *See* May v. State, 211 So. 2d 845, 846 (Miss. 1968) (defendant taking stand submits to cross-examination).

[302] 426 U.S. 610 (1976).

[303] *Id.* at 618-20. *See* United States v. Prescott, 581 F.2d 1343, 1352 (9th Cir. 1978) (the sole objective of the use of silence by the prosecutor is to induce the jury to infer guilt); United States v. Johnson, 558 F.2d 1225, 1230 (5th Cir. 1977) (accused's silence points to a desire to protect others and one's self, as well as lack of knowledge); Reid v. Riddle, 550 F.2d 1003, 1004 (4th Cir. 1977) (new trial granted when prosecutor in closing argument attempted to discredit defendant's self-defense story by reminding the jury that defendant never claimed self-defense before trial); Leon v. Kuhlmann, 443 F. Supp. 50, 55 (S.D.N.Y. 1977) (prosecutor could not introduce post-arrest silence as part of the state's case in chief). *But cf.* Anderson v. Charles, 447 U.S. 404, 408 (1980) (in cross-examining a criminal defendant, use of silence maintained after receipt of governmental assurance is barred, but cross-examination that merely inquires into prior inconsistent statements is not barred).

[304] *See* note 295 *supra.*

randa rights at the time of his arrest. Nevertheless, the majority opinion in *Cooley* made no reference to this fact, and was not based on the Supreme Court's holding in *Doyle*. Rather, the majority based its decision on the *Harris, Hass,* and *Day* holdings. The court's reliance on these cases appears misplaced since they specifically dealt with prior inconsistent statements obtained in violation of the defendant's *Miranda* right to an attorney, while *Cooley* involved the defendant's exercise of his *Miranda* right to remain silent. Clearly, the decision to remain silent differs from an accused voluntarily making incriminating statements. It is difficult to understand the application of the *Harris, Hass,* and *Day* holdings to the situation in which an accused who has the right to remain silent knowingly exercises that right.[305] Surely, silence is not so inconsistent with an accused's testimony at trial as to "conjure up the specter of perjury."[306]

A disturbing aspect of the *Cooley* decision is the court's failure to specify the scope of its holding. The court emphasized throughout its opinion that it was of "paramount importance, [that] the overall evidence . . . required a verdict of criminal homicide."[307] This statement indicates that the court might have held differently if the evidence had not been overwhelming. Thus, it is unclear in what instances the court intends to allow the use of pretrial silence to impeach.[308]

The rationales in *Day* and *Cooley* indicate that the Mississippi Supreme Court is following the lead of the United States Supreme Court in emasculating the *Miranda* decision.[309] The decision in *Day* is understandable since the *Miranda* warning has become a technical formality which operates to exclude reliable evidence. The accused's right to an attorney is not forfeited, it is merely subordinated to the truth-seeking process of criminal trial. The holding in *Cooley,*[310] on the other hand, is a virtual revocation of the *Miranda* right to remain silent. The right to remain silent before trial should not be forfeited by exercising the privilege of testifying in one's own defense. As a result of the court's decision in *Cooley,* however, if the accused intends to exercise his right to remain silent, he must remain silent throughout the entire criminal proceedings against him. The decisions in *Day* and *Cooley* eradicate the deterrent effect of the *Miranda* warnings by attempting to gain admission of the defendant's statements or silence through the "back door."[311]

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[305] The court cited *Harris* and *Hass* for the proposition that the Supreme Court has "relaxed considerably the strict application of the rules . . . established [in *Miranda*], particularly in the area of the use for impeachment purposes of matter obtained in violation of *Miranda* guidelines, where a defendant takes the stand to testify in his own defense." 391 So. 2d at 619. In *Cooley*, there was no violation of *Miranda;* on the contrary, the evidence used to impeach was consistent with the defendant's exercise of his *Miranda* right to remain silent. *Id.* at 621.

[306] 447 U.S. at 253 (Marshall, J., dissenting).

[307] 391 So. 2d at 619.

[308] In *Jenkins*, the Supreme Court left to the state courts the decision of "when prior silence is so inconsistent with present statements that impeachment by reference to such silence is probative." 447 U.S. at 239. *See* United States v. Hale, 422 U.S. 171, 180 n.7 (1975) (whether evidence is sufficiently inconsistent to be sent to the jury on the issue of credibility is ordinarily in the discretion of the trial court); Stewart v. United States, 366 U.S. 1, 5 (1960) (silence in one trial cannot be used to impeach testimony in a subsequent trial); *cf.* Grunewald v. United States, 353 U.S. 391, 423-24 (1956) (trial court may use its discretion in impeachment, but where there are grave constitutional overtones Supreme Court is justified in exercising supervisory control).

[309] *See generally* Deshowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of The Emerging Nixon Majority*, 80 YALE L.J. 1198, 1226-27

The Mississippi Supreme Court in 1980 was also confronted with a conflict between the defendant's sixth amendment right to conduct his own defense[312] and his fifth amendment right to remain silent[313] versus the state's right to cross-examine all witnesses offering testimony on behalf of the defense.[314] In *Jones v. State,*[315] while exercising his right

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(1971) (predicting erosion of *Miranda's* impact); *The Supreme Court, 1970 Term,* 85 Harv. L. Rev. 3, 52-53 (1971) (same).

[310] 391 So. 2d at 623.

[311] 447 U.S. at 251 (Marshall, J., dissenting). *See generally* Dershowitz & Ely, *supra* note 309, at 1219-21 (police may choose to violate *Miranda* in order to secure otherwise unobtainable evidence).

[312] In Faretta v. California, 422 U.S. 806 (1975), the United States Supreme Court held that the sixth amendment implies the right of a defendant to defend himself personally. *Id.* at 818-20. This right is conditioned upon the trial court's determination that the defendant made a "knowing and intelligent" waiver of his alternative right to have counsel represent him. *Id.* at 835. *But cf.* Price v. Johnston, 334 U.S. 266, 285-86 (1948) (prisoner in habeas corpus proceeding has no absolute right to argue his own case at the appellate level).

Prior to permitting a defendant to defend himself *pro se,* a trial judge must explain to him "the advantages and disadvantages of self-representation." 422 U.S. at 835. Moreover, a defendant must state unequivocally his desire to conduct his own defense without the assistance of counsel. Chapman v. United States, 553 F.2d 886, 892-93 (1977).

A defendant's right to conduct his defense personally or with the assistance of counsel in federal court is codified in 28 U.S.C. § 1654 (1976). *See* Faretta v. California, 422 U.S. 806, 812-13 (1975) (recognizing the historical protection of the right of self-representation under federal law).

[313] *See* Spevack v. Klein, 385 U.S. 511, 514-15 (1967) (defendant in state criminal proceeding has the right to remain silent and will not be penalized for exercising that right).

[314] *See* Alford v. United States, 282 U.S. 687, 691 (1931) (cross-examination of a witness is a matter of right); Autry v. State, 230 Miss. 421, 434-37, 92 So. 2d 856, 861-62 (1957) (state has right to cross-examine defendant who voluntarily takes the stand).

to argue his case to the jury, the defendant made several statements which tended to mitigate his participation in the murder.[316] The statements were unsupported by the record and thus constituted the defendant's own testimony. Since the defendant abstained from actually testifying under oath, the state never had an opportunity to cross-examine him on these statements. The state, therefore, objected to the statements.[317] On appeal, the defendant argued that the state's objection constituted reversible error because he had an absolute right not to testify and the prosecutorial comment on his failure to testify violated the fifth amendment privilege against self-incrimination.[318]

In Missisippi, a defendant has the right to conduct his own defense or retain the assistance of counsel, or both.[319] Hence, the defendant was properly utilizing his right to argue his case *pro se* to the jury although he had not taken part in any other phase of the trial.[320] When a defendant chooses to conduct his own defense he is subject to the same rules of procedure and substantive law that govern all trials.[321]

When a defendant exercises his fifth amendment right to remain silent at trial, prosecutorial comment upon his failure to testify is a ground for reversal.[322] The privilege against self-incrimination, however, is not absolute. This privilege may be waived in certain in-

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[315] 381 So. 2d 983 (Miss. 1980). The defendant was convicted of capital murder and received the death sentence. He appealed both the guilt-determining and sentencing phases of the trial. Upon reviewing the guilt-determining phase, the supreme court found no reversible errors and thus upheld the jury's guilty verdict. *Id.* at 987-91.

[316] During the sentencing phase of the trial, the defendant decided not to take the stand as a witness. In his argument to the jury, the defendant attempted to relate his version of the murder incident. *Id.* at 997-98.

[317] The state objected four times to statements made by the defendant. The grounds for the objections were that there was no evidence on the matter which the defendant was asserting, the defendant's closing argument was in essence his own testimony, and the state had no way to cross-examine the defendant regarding the statements since the defendant refrained from taking the stand. *Id.* at 997-98.

[318] *Id.* at 993.

[319] MISS. CONST. art. 3 § 26.

[320] *See* Ballard v. State, 366 So. 2d 668, 668 (Miss. 1979) (defendant has the right to argue his case personally to the jury); Gray v. State, 351 So. 2d 1342, 1345 (Miss. 1977) (same).

[321] *See* Faretta v. California, 422 U.S. 806, 833-34 (1975) (defendant who argues *pro se* must comply with relevant rules of procedural and substantive law).

[322] *See, e.g.,* Griffin v. California, 380 U.S. 609, 612-15 (1965) (fifth amendment prohibits the state from commenting on the accused's silence); Austin v. State, 384 So. 2d 600, 601 (Miss. 1980) (prosecutorial comment on defendant's right to remain silent violates defendant's right against self-incrimination); Peterson v. State, 357 So. 2d 113, 115-17 (Miss. 1978) (improper statement regarding defendant's failure to testify constituted reversible error).

stances.[323] For example, if a defendant takes the stand and testifies on the merits of the case the state is entitled to cross-examine him on incriminating matters.[324]

In *Jones,* the court resolved the conflict between the state's right to cross-examine all witnesses who testify and the defendant's fifth amendment right to remain silent in favor of the state.[325] The court held that when a defendant chooses not to testify, yet argues *pro se,* he must confine his remarks to inferences reasonably drawn from the record.[326] If a defendant comments on a material point clearly beyond the record, "he will be deemed to have waived the right not to have his failure to take the stand commented upon."[327] The waiver would be partial only, since the prosecution would be unable to cross-examine the defendant.[328] The state could comment to the jury, however, that the defendant's statements were not given under oath and that he was not subject to cross-examination.[329]

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[323] There are three instances in which prosecutorial comment on a defendant's failure to testify is not reversible error: (1) where the evidence of guilt is so overwhelming that the improper comment amounted to "harmless error," Austin v. State, 384 So. 2d 600, 601 (Miss. 1980); (2) where the defendant fails to object specifically to the improper comment, Sanders v. State, 260 So. 2d 466, 468 (Miss. 1972); and (3) where "there was an eye-witness other than defendant available to the accused who was not placed upon the stand by him," Chatman v. State, 244 Miss. 659, 669, 145 So. 2d 707, 710 (1962).

[324] Autry v. State, 230 Miss. 421, 435, 92 So. 2d 856, 861-62 (1957).

[325] 381 So. 2d at 993-94.

[326] *Id.* at 993. The supreme court stated:

> The Fifth Amendment privilege against self-incrimination is a shield, not a sword. A criminal defendant who takes advantage of his right to argue his case to the jury must not be permitted to say all the things he might have testified to had he chosen to call himself as a witness.

Id.

It is a well-established rule that in closing argument counsel and/or the defendant has the right to deduce and infer reasonable conclusions based upon the evidence. Chinn v. State, 276 So. 2d 456, 459-60 (Miss. 1973). Moreover, in drawing conclusions from the evidence, considerable latitude is given. Coley v. State, 378 So. 2d 1095, 1097-98 (Miss. 1980); Cannon v. State, 190 So. 2d 848, 851-52 (Miss. 1966). *But see* Anderson v. State, 381 So. 2d 1019, 1023 (Miss. 1980) (state's objection during closing argument to defense counsel's comment upon the television series "Roots" was properly sustained on the grounds that defense counsel was going beyond the scope of the record); Daumer v. State, 381 So. 2d 1014, 1016-17 (Miss. 1980) (use of figure of speech or metaphor by prosecutor in closing argument was improper, but was not so prejudicial as to require reversal).

[327] 381 So. 2d at 993.

[328] *Id.* at 993-94.

[329] *Id.* at 993. The court declared that a defendant's constitutional right to argue *pro se* will be "adequately protected if the court gives him a clear and direct warning out of the presence of the jury prior to beginning his argument that such limited comment

In 1980, the Mississippi Supreme Court also considered the procedure to be followed in determining the voluntariness of a confession or statement. This procedure had been set forth earlier by the court in *Agee v. State.*[330] In *Craft v. State,*[331] the court dealt with the effect of this procedure on the admissibility of three statements given to law enforcement officials.

In *Craft,* the defendant was arrested in Chicago, Illinois, for an armed robbery committed in Mississippi. The first statement was obtained when two Mississippi officers gained custody of the defendant and an accomplice in Chicago to return them to Mississippi. Prior to

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might follow if he goes outside the record and gives what amounts to unsworn testimony." *Id.*

[330] 185 So. 2d 671 (Miss. 1966). This procedure was reiterated in Scott v. State, 382 So. 2d 1091 (Miss. 1980). After the defendant and his father testified that the statement was not given freely and voluntarily, the state failed to produce one of the officers present at the time it was taken.

The court stated in *Scott:*

> 1. The preliminary hearing on the question of the admissibility of a confession must be in the absence of the jury and should be conducted before the trial on the merits begins.
>
> 2. The State has the burden of proving the voluntariness of a confession. This burden is met by testimony of an officer that the confession was voluntarily made without any threats, coercion, or offer of reward. Such testimony makes out a prima facie case for the State on the question of voluntariness.
>
> 3. When, after the State has made out a prima facie case as to the voluntariness of the confession, the accused offers testimony that violence, threats of violence, or offers of reward induced the confession, *then the State must offer all the officers who were present when the accused was questioned and when the confession was made, or give an adequate reason for the absence of any such witness.*
>
> The foregoing rules have been stated in numerous cases.

Id. at 1093 (emphasis added). Since these requirements were not met, the conviction in *Scott* was reversed.

In Smith v. State, 386 So. 2d 1117 (Miss. 1980), the state made out a "prima facie case of voluntariness by showing that [defendant] was twice given *Miranda* warnings, signed a waiver before making his statement, and was not coerced or offered reward for his confession." *Id.* at 1120. After the state rested, the defendant testified that psychological coercion and promises of a more lenient sentence had been used to obtain the confession. Thereupon, the state called on all the officers present at the time defendant made the statement, complying with the requirements prescribed in *Miranda* and *Agee.* The conflicting testimony created an issue of fact for the trial court, which it resolved in favor of the state. *Id. See* Miles v. State, 360 So. 2d 1244, 1246 (Miss. 1978) (vacation not adequate reason for officer's absence at trial); Holt v. State, 348 So.2d 434, 438 (Miss. 1977) (testimony of all officers present at time of statement sufficient to rebut defendant's claim of involuntariness).

[331] 380 So. 2d 251 (Miss. 1980).

departure, the defendant was given the *Miranda* warning.[332] During the trip home, the officers overheard the defendant and his accomplice arguing over who had possession of the weapon used in the robbery. The suppression hearing disclosed no testimony indicating that the admissions were the result of coercion, duress, threats or promises;[333] therefore, the statements were admitted into evidence in the state's case in chief. The defendant contended that because only one of the officers present when the statement was made testified on behalf of the state, the state had failed to comply with the procedural requirements set forth in *Agee v. State*.[334]

In upholding the trial court's decision, the supreme court noted that the record was devoid of evidence showing that the statements were involuntarily given. Rather, the officers incidentally overheard the defendant's argument with his accomplice.[335] Thus, *Agee* was inapplicable because it "appl[ies] only to statements alleged to have been involuntarily made either as the result of threats or coercion by police officers to elicit a confession."[336]

The second disputed statement made by the defendant concerned his participation in the crime, and was made while in custody in a Mississippi jail. The defendant received the *Miranda* warning and signed a waiver of rights prior to giving the statement. After the statement had been transcribed, the defendant refused to sign it.[337] He argued that this statement was inadmissible because it was given as a result of intimidation tactics and it was unsigned.[338]

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[332] *Id.* at 253. The officer's testimony that defendant received his *Miranda* warning was uncontradicted.

[333] The officers testified that they did not communicate with the defendant in hopes of eliciting a statement. The defendant neglected to attack the voluntariness of the statement, but he did allege that he had been "roughed up" prior to leaving Chicago. This action, however, was clearly taken long before defendant made the incriminating statement. *Id.* at 253-54.

[334] *Id.* at 253. In *Agee,* 185 So. 2d at 673, the court first set forth the procedure to prove the voluntariness of a statement. *See* note 330 *supra*. *But see* Moss v. State, 386 So. 2d 1129, 1131 (Miss. 1980) (absence of female officer present at the time defendant's statement was taken permitted since officer's physician stated that she was pregnant and "should not be subjected to the trauma in a courtroom").

[335] 380 So. 2d at 253. In Neal v. State, 386 So. 2d 718 (Miss. 1980), the defendant shot a man and immediately went to the police station. The only person at the station was Jimmy Boyd, a civilian working as a dispatch-radio operator. Boyd asked the defendant to put down the gun he was carrying. The defendant complied with the request and voluntarily confessed that he had shot a man. Boyd inquired into the location of the shooting and defendant told him. The defendant then made other incriminating statements. Prior to defendant's arrival, Boyd had no knowledge of the shooting. *Id.* at 720. The court held the statements made to Boyd admissible in the state's case in chief. The defendant's argument that he should have been given his *Miranda* rights was rejected. The statements were voluntary and spontaneous and, thus, admissible. *Id.*

[336] 380 So. 2d at 254. *See* Jordan v. State, 320 So. 2d 376, 377 (Miss. 1975) (failure to put all officers on stand to prove voluntariness of statement was immaterial where voluntariness not an issue).

Addressing the intimidation claim, the supreme court noted that there was conflicting evidence on this issue. The trial court, however, resolved the factual issue in favor of the state,[339] and the supreme court upheld the trial court's determination on this issue. Regarding the admissibility of the unsigned statement, the court stated that an *Agee* issue was not present. *Agee* applies only when the voluntariness of the statement is in issue.[340] The issue surrounding an unsigned statement is its accuracy, not its voluntariness. Citing *Wong Sun v. United States,*[341] the supreme court declared that the fact that a statement is unsigned does not render it inadmissible;[342] however, it may affect the weight and credibility of the statement.[343]

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[337] 380 So. 2d at 253.

[338] *Id.* at 254. The defendant testified that an officer came to his cell and sprayed him with mace until he agreed to relate his participation in the crime. The officer accused denied the allegation. *Id.* at 254.

[339] *Id.* In Harrigill v. State, 381 So. 2d 619, 623 (Miss. 1980), the defendant attacked the voluntariness of an inculpatory statement on the ground that it was the result of a promise of immunity. The testimony of the investigator conflicted with defendant's testimony. The trial court resolved the factual issue in favor of the state, and since the evidence was sufficient to support that determination, the decision was affirmed. In the subsequent case of Reddix v. State, 381 So. 2d 999, 1005-07 (Miss. 1980), the defendant alleged that "his earnest concern [to free an accomplice] was used by overreaching officers to lead him to make an involuntary confession." The state rebutted defendant's allegation. Thus the trial court's determination that the confession was free and voluntary was not contrary to the evidence. As a result, the statement was properly admitted in the state's case in chief. *Id.* at 1006.

[340] The state fulfilled all the requirements mandated by *Agee.* The defendant admitted that the statement was accurate and his only attack on voluntariness was the alleged mace incident, which the trial court disposed of in favor of the state. Therefore, the voluntariness of the statement was no longer in issue. 380 So. 2d at 254.

[341] 371 U.S. 471, 491 (1963) (an unsigned statement, when given voluntarily and in compliance with the *Miranda* requirements, is properly admissible in the state's case in chief; absence of signature affects only the weight and credibility to be accorded the statement).

[342] 380 So. 2d at 254. Responding to defense counsel's discovery motion in Lee v. State, 383 So. 2d 821, 823 (Miss. 1980), the state failed to include an oral statement made by defendant at the time of his arrest. The statement, made to an officer, was withheld from the district attorney until shortly before trial. The defense counsel argued that Armstrong v. State, 214 So. 2d 589, 596 (Miss. 1968), required the state either to disclose the statement or be precluded from admitting it at trial. 383 So. 2d at 822-23. On appeal, the court stated that *Armstrong* entitled a defendant to inspect tangible evidence which may be used against him. The statement here was neither reduced to writing nor was it in possession or within the knowledge of the district attorney at the time

The third statement, detailing the defendant's role in the robbery, was given by the defendant to two officers in Flint, Michigan.[344] Whether the defendant received the *Miranda* warning prior to or subsequent to making the inculpatory statement was disputed. Only one Michigan officer testified on behalf of the state.[345] The defendant asserted that, under *Agee,* all of the officers present at the time the *Miranda* warning was allegedly given were required to testify.[346] The court disagreed with defendant's attempt to extend the *Agee* requirements to *Miranda* warnings, and concluded that while it is preferable to obtain the testimony of all officers present at the giving of the *Miranda* warnings, *Agee* does not impose that requirement.[347] *Agee* involved only the question of the voluntariness of statements.[348]

The decision in *Craft* gave the court an opportunity to clarify the application of its pronouncement in *Agee.* Only when the voluntariness of a statement is attacked does the *Agee* procedure come into play. The narrow application of *Agee* is preferable, considering the mobility of today's criminals. When the voluntariness of the statement is not attacked, the burden of producing all officers present at the time a statement is given would be both time-consuming and costly.

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the discovery order was granted. Moreover, defense counsel had an alternative means of discovering the existence of the statement: he could have subpoenaed the arresting officers and discovered their testimony. For the preceding reasons and because of the failure to show defendant was prejudiced by the state's oversight, the decision was affirmed. *Id.* at 823.

[343] 380 So. 2d at 254. *Cf.* Jordan v. State, 320 So. 2d 376, 377 (Miss. 1975) (defendant's allegation that transcript of confession was inaccurate affected weight and credibility to be given the testimony by the jury).

[344] 380 So. 2d at 253. Prior to his trial for armed robbery, the defendant escaped from jail and was recaptured in Michigan by officers of the Flint Police Department. *Id.*

[345] *Id.* at 254. No explanation was given for the officer's absence at trial.

[346] *Id.*

[347] *Id.* The court recognized that while "the state bears a heavy burden of proving compliance" with the *Miranda* requirements, the *Miranda* decision was silent on the procedure to prove compliance. *Id.* at 254-55. The court decided it would be an unnecessary burden on the state and the court to require the testimony of all the officers present when the warning was allegedly given. *Agee,* of course, was inapplicable since it applies only when the voluntariness of the statement is in issue. *Id.*

[348] *Id.*

INSURANCE

The most consequential insurance case in Mississippi in 1980[1] was *United States Fidelity & Guaranty Co. v. Pearthree*[2] [*Pearthree II*]. The litigation culminating in *Pearthree II* had its genesis in an automobile accident which fatally injured Diane Pearthree's mother, Patricia Shumate.[3] Mrs. Shumate's husband had an automobile insurance policy with U.S.F.&G. which provided coverage for each of his two automobiles.[4] Under a statutorily imposed uninsured motorist clause,[5] the policy limited coverage to $10,000 "per person" and $20,000 "per accident."[6] James Fannin, the driver and owner of the car in which

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[1] Decisions of less importance rendered during 1980 include: Gulf Guar. Life Ins. Co. v. Kelley, 389 So. 2d 920, 922 (Miss. 1980) (defendant estopped from cancelling master policy after onset of deceased insured's illness); State Farm Mut. Auto. Ins. Co. v. Lindsey, 388 So. 2d 1189, 1193-94 (Miss. 1980) (where insurer accepted late premium payment, question of insurer's waiver of forfeiture is for jury); Highlands Ins. Co. v. McLaughlin, 387 So. 2d 118, 120-21 (Miss. 1980) (insurer breached duty when it delivered settlement draft to mortgagor only); Employers Ins. of Wausau v. Weems, 382 So. 2d 479, 480-81 (Miss. 1980) (insurer could seek specific performance of policy provision allowing inspection of insured's business records where liability of insurer depended upon number of employees on insured's payroll); State *ex rel.* Poole v. Maryland Cas. Co., 380 So. 2d 238, 239-40 (Miss. 1980) (failure of county board of supervisors to obtain liability insurance for sheriff does not render board members or their sureties liable to plaintiff for damages resulting from sheriff's negligence, where damages were uncollectible from sheriff); State Farm Mut. Auto. Ins. Co. v. Roberts, 379 So. 2d 321, 322 (Miss. 1980) (good faith dispute concerning value of loss precluded award of punitive damages against insurer).

[2] 389 So. 2d 109 (Miss. 1980). The case originated in the Chancery Court of Lauderdale County as a direct action by Diane Simmons Pearthree against United States Fidelity & Guaranty Company and Hartford Accident & Indemnity Company. Upon an adverse judgment Pearthree appealed to the Mississippi Supreme Court for the first time. Pearthree v. Hartford Accident & Indem. Co. [*Pearthree I*], 373 So. 2d 267, 268 (Miss. 1980). In neither *Pearthree I* nor *Pearthree II* did the supreme court explain the basis for the chancery court's jurisdiction of the matter. *See* 389 So. 2d at 110; 373 So. 2d at 268.

[3] Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 268 (Miss. 1980). The occupants of the automobile were Mrs. Shumate, James Fannin and his wife, Eleanor. Mr. Fannin and Mrs. Shumate were killed; Eleanor Fannin sustained personal injuries. *Id.* at 268-69.

[4] 389 So. 2d at 110.

[5] *See* Miss. Code Ann. § 83-11-101(1) (Supp. 1980) (mandating inclusion in insurance policy of provision requiring the insurer to pay the insured damages resulting from an automobile accident caused by an uninsured motorist).

[6] *See id.* § 63-15-3(j) (Supp. 1980) (delineates the minimum amounts to be recover-

Mrs. Shumate was a passenger, was insured by Hartford Accident & Indemnity Company pursuant to a policy covering both of his automobiles.[7] The accident from which the litigation arose was caused by the negligence of an uninsured motorist.[8]

In a good faith effort to satisfy its obligations, Hartford paid Eleanor Fannin and her three children approximately $20,000.[9] U.S.F.&G. settled the claims of Mrs. Shumate's survivors, excluding Pearthree, by paying them nearly $10,000.[10] Hartford also paid them $100 for a covenant not to sue.[11]

Pearthree sued Hartford and U.S.F.&G. under the uninsured motorist clauses and sought to aggregate the policies to recover $40,000 for the accident.[12] The chancery court ruled that Pearthree was not an "insured" within the meaning of the uninsured motorist clauses.[13] Furthermore, the lower court concluded that the policies could not be "stacked," or aggregated, in order to multiply the individual policy limits.[14] Pearthree appealed, and in *Pearthree v. Hartford Accident & Indemnity Co.*[15] [*Pearthree I*] the Mississippi Supreme Court reversed the chancery court[16] and remanded for a determination of damages.[17]

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able for an automobile accident with an uninsured motorist).

[7] 389 So. 2d at 110.

[8] *Id.*

[9] *Id.* at 110 n.1. Hartford paid Eleanor Fannin $9,900 for her personal injuries and an additional $10,000 to Mrs. Fannin and her three children for the death of James Fannin. *Id.*

[10] *Id.* at 110. U.S.F.&G. paid $10,000 to Mr. Shumate and the Shumate children for Mrs. Shumate's death. Pearthree was apparently the daughter of Mrs. Shumate by another marriage.

[11] *Id.*

[12] Pearthree v. Hartford Accident & Indem. Co., 373 So. 2d 267, 268-69 (Miss. 1980).

[13] *Id.* at 269.

[14] *Id.* The court also held that Pearthree was estopped from any action against the insurance companies since she failed to give timely notice to the insurers of the claim she intended to make against them. *Id.*

[15] 373 So. 2d 267 (Miss. 1980).

[16] *Id.* at 269, 273. In determining that Pearthree was an "insured," the supreme court noted that the policies included in their descriptions of "insureds" any person entitled to recover damages resulting from bodily injury to which the policy applied. *Id.* at 271. The court reasoned that since Pearthree would be entitled to bring an action for the wrongful death of her mother, *see* MISS. CODE ANN. § 11-7-13 (Supp. 1980) (wrongful death statute), then she was an "insured" within the meaning of the policy. 373 So. 2d at 271.

Regarding the issue of "stacking," the court concluded that since the policy was ambiguous, the court was compelled to construe the policy in the manner most favorable to the insured and to allow the policies to be aggregated. *Id.; see* Hartford Accident and Indem. Co. v. Bridges, 350 So. 2d 1379, 1381-82 (Miss. 1977) (ambiguous limits of liabil-

On remand, the lower court rendered judgment against the insurers for $30,000 in equal amounts.[18] The insurers appealed, and in *Pearthree II,* the supreme court again reversed the lower court,[19] approving several assignments of error.

The first assignment of error addressed by the court dealt with the chancery court's ruling that the $30,000 represented damages for Pearthree's own benefit, in addition to all other wrongful death beneficiaries.[20] Since Pearthree brought the suit solely for her own benefit, the supreme court determined that an award of damages potentially available to all wrongful death beneficiaries went beyond the claims set forth in her pleadings and was not allowable.[21]

This reasoning is somewhat confusing, however, in light of other points made in the supreme court's decision. The insurers contended that Pearthree's pleadings limited her claims to her reasonable expectation of benefits from the deceased, and that the evidence on this point was insufficient since it related only to the total present value of the decedent's life expectancy.[22] In support of this argument, the insurers quoted language from the lower court's decree to the effect that the $30,000 award represented damages for the plaintiff and other

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ity clause in uninsured motorist policy must be construed against drafter to allow aggregation of policy limits); *cf.* Talbot v. State Farm Mut. Auto. Ins. Co., 291 So. 2d 699, 701-02 (Miss. 1974) (unambiguous limits of liability clause in uninsured motorist policy precludes stacking). *But see* Southern Farm Bureau Cas. Ins. Co. v. Roberts, 323 So. 2d 536, 538 (Miss. 1975) (payment of separate premiums for separate policies is basis for allowing insured to aggregate policies). *See generally 1979 Mississippi Supreme Court Review,* 50 Miss. L.J. 813, 821-27 (1979) (discussion of aggregation of claims).

The supreme court additionally held in *Pearthree I* that Pearthree could not be viewed as two "persons" under the policies because she had not qualified as a representative of the estate of her mother. 373 So. 2d at 272.

[17] 373 So. 2d at 273.

[18] 389 So. 2d at 110.

[19] *Id.* at 113.

[20] *Id.* at 111. Specifically, the lower court awarded $30,000 and stated that this amount was for "[c]omplainant's own benefit and for all other wrongful death beneficiaries, leaving the ultimate question as to the disposition of any judgment rendered herein as between complainant and the other beneficiaries under the wrongful death statute as did the decision of the Supreme Court." *Id.* The supreme court noted that Pearthree was the only plaintiff in the suit before the court and that she was suing only for her benefit and not as a statutory beneficiary or as a representative of the other potential wrongful death beneficiaries. *Id.*

[21] *Id.* at 111, 113. The supreme court reversed and remanded to the chancery court for a determination of the damages payable solely to Pearthree as opposed to all potential wrongful death beneficiaries. *Id.* at 113.

[22] *Id.* at 112.

wrongful death beneficiaries.[23]

The insurer's argument was based on the distinction between a wrongful death action for the benefit of a survivor and an action by the personal representative of the deceased for all injuries to the deceased and his estate. This distinction was discussed by the Mississippi Supreme Court in *Thornton v. Insurance Co. of North America,*[24] in which the court held that damages recoverable by the beneficiary are limited to such items as care and loss of support, consortium, and services reasonably expected to be received from the decedent.[25] This action has been labeled a "new action" because it establishes a cause of action for the benefit of the persons named in the wrongful death act.[26]

In a suit brought by the decedent's representative, however, the proper elements of damages are not limited to those listed above, but include the net cash value of the decedent's expected lifetime earnings plus damages to the decedent himself, such as conscious pain and suffering, punitive damages, and the costs of estate administration.[27] Such an action has been referred to as a "survival action," because it allows the decedent's personal claim to survive his death.[28]

In *Pearthree II*, the court's initial response to the insurers' argument regarding damages was that Pearthree's recovery was not limited to her pro rata share as one of five statutory beneficiaries of her mother's estate because there was no mention in the policies of any percentage limitation.[29] The policy provisions, however, should have no bearing in determining the proper elements of damages and proof thereof in a wrongful death-type action. Instead the damages should have been decided by reference to the wrongful death statute and its judicial construction.[30]

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[23] *Id.*

[24] 287 So. 2d 262 (Miss. 1973). *Thornton* involved a suit by the insurer against the wife of its deceased insured. The wife had reached a settlement with the tortfeasor and accepted consideration in exchange for a partial release of the tortfeasor. The insurer brought suit against the wife, alleging that the release destroyed its subrogation rights against the tortfeasor. *Id.* at 263-64. The supreme court held that the settlement and release were limited to claims not available to the insurer as part of its subrogation right. *Id.* at 265.

In reaching this decision, the court discussed at length the damages available to various persons under the wrongful death statute. *Id.* at 265-67. The wrongful death statute is codified at MISS. CODE ANN. § 11-7-13 (Supp. 1980).

[25] 287 So. 2d at 265.

[26] *See* Byars v. Austin, 218 So. 2d 11, 15 (Miss. 1969) (wrongful death statute creates a new action and is not part of the estate of the deceased intestate).

[27] *See, e.g.,* Thornton v. Insurance Co. of N. Am., 287 So. 2d 262, 266-67 (Miss. 1973) (damages available in a wrongful death action); MISSISSIPPI CIRCUIT COURT JUDGE'S ASSOCIATION & MISSISSIPPI JUDICIAL COLLEGE, MISSISSIPPI MODEL JURY INSTRUCTIONS §§ 20.18, 20.19 (1977) (listing in form of instruction the damages recoverable in a wrongful death suit). *See generally* Luckett & Thomas, *Wrongful Death Damages in Mississippi,* 43 MISS. L.J. 633 (1972).

[28] *See* MISS. CODE ANN. § 91-7-233 (1972) (executor may initiate any proceeding decedent may have commenced).

Further confusion results from the court's holding that Pearthree was entitled to recover "whatever loss of the deceased's society and companionship" she could prove plus "her one-fifth (1/5) of the present net cash value of the deceased's life expectancy."[31] Because only a decedent's personal representative is entitled to seek survival benefits,[32] and since Pearthree had neither qualified as such[33] nor brought a wrongful death action for the benefit of all statutory beneficiaries, it is inexplicable why the court allowed her to recover survival benefits in the form of a share of the decedent's estate instead of requiring her to prove the economic benefits she had a reasonable expectation of receiving but for her mother's death.[34]

The confusion as outlined above pales in comparison with the ramifications *Pearthree II* may have on uninsured motorist coverage in Mississippi. Specifically, the court has equated the term "insured," which involves coverage, with "person," which relates to the limits of liability. The two are not the same.[35]

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[29] 389 So. 2d at 111.

[30] The insurers apparently argued that Pearthree was entitled only to the actual damages she could prove, such as loss of pecuniary advantages she could have reasonably expected to receive from her mother but for her death. This argument relied on the principles of the wrongful death statute and pleading and proof of damages thereunder. In no way should an insurance policy limitation clause affect pleading and proving these damages, other than to maximize the amount actually available *assuming* the provable damages reached those limits.

[31] 389 So. 2d at 112.

[32] *See* Thornton v. Insurance Co. of N. Am., 287 So. 2d at 265 (construing Mississippi law to authorize only a personal representative to bring suit to recover deceased's assets).

[33] 389 So. 2d at 112; 373 So. 2d at 272.

[34] In holding that Pearthree was entitled to recover for loss of her mother's society and companionship plus one-fifth of the net cash value of her mother's life expectancy, the supreme court, in effect, treated Pearthree's case as one-fifth of a wrongful death action. Since Pearthree did not base her action on the wrongful death statute, however, her recovery should have been limited to the losses she sustained personally, rather than a share of the estate to which she would have been entitled as a statutory beneficiary.

[35] Under the uninsured motorist endorsements written in Mississippi, the term insured is usually defined as:

> [T]he named insured and, while resident of the same household, the spouse of any such named insured and relatives of either, . . . and any person who uses, with the consent, expressed or implied, of the named insured, the motor vehi-

Included in the policies at issue in *Pearthree II* are standard "limits of liability" clauses which limit the liability of the insurers to $10,000 "per person" under each of the policies.[36] The policies provide explanations of this limit as follows:

> The limit of liability for Uninsured Motorist (Family Protection) Coverage stated in the declaration as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care or loss of services, *because of bodily injuries sustained by one person* as the result of any one accident . . . .[37]

The supreme court implicitly determined in *Pearthree I* that the total limits of liability under the combined policies amounted to $40,000 "per person" and $80,000 "per accident."[38] Additionally, the

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> cle to which the policy applies, and a guest in such motor vehicle to which the policy applies, or the personal representative of any of the above.

MISS. CODE ANN. § 83-11-103(b) (Supp. 1980).

Other policies, including the ones at issue in *Pearthree I* and *Pearthree II* are broader. The Hartford policy included as insureds:

> (1) The named insured as stated in the policy . . . and any person designated as named insured in the schedule, and while residents of the same household, the spouse of any such named insured and relatives of either;
>
> (2) Any other person while occupying an insured automobile, and
>
> (3) Any person, with respect to damages he is entitled to recover because of bodily injury to which this endorsement applies sustained by an insured under (1) and (2) above.

373 So. 2d at 271. The U.S.F.&G. policy described an insured as: "(a) The named insured and any relative; (b) Any other person while occupying an insured automobile; (c) Any person with respect to damages he is entitled to recover because of bodily injury to which this Part applies sustained by an insured under (a) or (b) above." *Id.*

In order for liability on the part of the insurer to accrue, bodily injuries must be sustained by a person who is an "insured" under the policy. Whether Pearthree was an "insured" was a threshold question involving her right, if any, to recover under the policies. This determination should have had no effect on the limits of liability.

The limitation clauses of such policies usually track the language of MISS. CODE ANN. § 63-15-11(4) (Supp. 1980), requiring uninsured motorist coverage "of not less than ten thousand dollars ($10,000.00) because of *bodily injury* to or death of one (1) person in any one (1) accident." *Id.* (emphasis added). Thus, the limits of liability question is answered not by whether Pearthree was an "insured," but by the number of persons sustaining bodily injury. The *Pearthree II* court held that because she was an "insured," Pearthree was to be treated as a "person" for limitation clause purposes. 389 So. 2d at 112.

[36] 373 So. 2d at 267.

[37] *Id.* (emphasis added).

[38] *Id.* at 269-70. The $40,000 and $80,000 figures were not specified by the court, but they necessarily follow from the court's holding that the $10,000/$20,000 policies on the

court stated that Pearthree was an "insured" within the terms of the policies' coverage clauses.[39] In *Pearthree II,* the insurance companies argued that the "per person" limits referred to the deceased only, rather than to Pearthree. The court disagreed and declared categorically that per person limits referred to all "insureds," and Pearthree was an "insured."[40]

With this brief statement, Mississippi became the only jurisdiction in the United States to construe "per person" limitation clauses as applicable to claimants, rather than to persons who are "bodily injured." Of the twenty-three jurisdictions to confront this issue, twenty-two have held either specifically or impliedly that the "per person" limitation clause refers to the person who is bodily injured in the accident rather than to the person who suffers damage, such as loss of services, which is a consequence of, or derived from, the bodily injury.[41]

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four automobiles should be aggregated. *Id.* at 270-71.

[39] *Id.* at 271; *see* note 35 *supra.*

[40] 389 So. 2d at 112.

[41] *See, e.g.*, General Accident Fire & Life Assur. Corp. v. Clark, 34 F.2d 833, 835 (9th Cir. 1929) (applying Arizona law) (joint recovery by husband and wife as a result of wife's injuries improper since in excess of liability limitation); Smith v. State Farm Mut. Auto. Ins. Co., 252 Ark. 57, 477 S.W.2d 186, 187 (1972) (recovery of maximum amount under policy by husband precludes recovery by wife for loss of consortium); United Servs. Auto. Ass'n v. Warner, 64 Cal. App. 3d 957, 965, 135 Cal. Rptr. 34, 38 (Ct. App. 1976) (per-person policy limit to wife's claim for bodily injuries similarly applies to spouse's claim for loss of consortium); Skroh v. Travelers Ins. Co., 227 So. 2d 328, 330 (Fla. Dist. Ct. App. 1969) (policy reference to "bodily injury" relates only to the injured person and not to survivor's claim for pain and suffering); State Farm Mut. Auto. Ins. Co. v. Hodges, 221 Ga. 355, 144 S.E.2d 723, 725 (1965) (limitation of liability clause precluded wife's recovery for loss of consortium of amount greater than difference between husband's recovery for personal injuries and the limitation); Gass v. Carducci, 52 Ill. App. 2d 394, 202 N.E.2d 73, 77 (policy limitation of liability clause allows recovery for damages arising from bodily injury sustained by a single person in any one accident), *modified,* 52 Ill. App. 2d 394, 203 N.E.2d 289 (1964); Graham v. American Cas. Co., 261 La. 85, 259 So. 2d 22, 25 (1972) (father barred from recovering medical expenses under policy limiting liability for bodily injury to specific amount where daughter obtained maximum recovery); Travelers Indem. Co. v. Cornelsen, 272 Md. 48, 321 A.2d 149, 150 (1974) (loss of consortium was not a bodily injury suffered by a second person as a result of the same accident); Saltzburg v. Lumbermans Mut. Cas. Co., 326 Mass. 351, 94 N.E.2d 269, 271 (1950) (insurer not obligated to pay husband's consequential damages resulting from accident causing personal injury to wife); Dunn v. Travelers Ins. Co., 1978 Mass. App. Ct. Adv. Sh. 838, 378 N.E.2d 1007, 1008 (1978) (aggregated damages awarded to husband and wife controlled by per-person policy limits); Pastucha v. Roth, 290 Mich. 1, 287 N.W. 355, 360-61 (1939) (father's recovery of medical expenses in excess of policy's limitation of liability clause necessitated deduction from maximum limit); Holtz v. Mutual Serv. Cas. Co., 264 Minn. 121, 117 N.W.2d 767, 770 (1962) (husband barred from recovering part of spouse's medical expenses which exceeded policy limitation); United

The rationale employed by the majority of jurisdictions was stated by the South Carolina Supreme Court in *Sheffield v. American Indemnity Co.*[42] After the insurer refused to pay the judgment recovered by the husband, he brought a direct action against the insurer for $10,000, claiming to be "another person" under the limits of liability clause. The South Carolina Supreme Court rejected this argument, reasoning that "per person" in the limitation clause obviously referred to the person who actually sustained bodily injury.[43] Since only the wife had sustained a bodily injury, and the policy limited liability to $10,000 for each person bodily injured, the court concluded that the payment of $10,000 to the wife satisfied the insurer's total liability under the policy.[44]

The rationale of *Sheffield* was reaffirmed recently in *United Ser-*

States Fidelity & Guar. Co. v. Safeco Ins. Co. of Am., 522 S.W.2d 809, 821 (Mo. 1975) (en banc) (recovery for consequential damages resulting from injury to one person subject to defeat by limitation of liability clause); Wilson v. Capital Fire Ins. Co., 136 Neb. 435, 286 N.W. 331, 333 (1939) (award of consequential damages above policy limitation held improper); Putnam v. Employers Liab. Assur. Corp., 90 N.H. 74, 4 A.2d 353, 354 (1939) (consequential loss to husband for expenses incurred held not a distinct bodily injury enabling recovery); Williams v. State Farm Mut. Auto. Ins. Co., 99 N.J. Super. 377, 240 A.2d 38, 41 (Super. Ct. Law Div. 1968) (consequential damages arising from personal injury are subject to policy limitation of liability clause), *aff'd,* 104 N.J. Super. 403, 250 A.2d 155 (Super. Ct. App. Div.), *aff'd,* 54 N.J. 580, 258 A.2d 368 (1969); Brustein v. New Amsterdam Cas. Co., 255 N.Y. 137, 174 N.E. 304, 305 (1931) (husband may not recover since he received no bodily injury from loss of services of injured wife); Napier v. Banks, 9 Ohio App. 2d 265, 224 N.E.2d 158, 162 (1967) (recovery of maximum limit by wife barred spouse's recovery for medical expenses, loss of services, or loss of consortium); Smith v. Cassida, 403 Pa. 404, 169 A.2d 539, 541 (1961) (direct and consequential damages arising from bodily injury of one person may not be broken up in order to increase the limit of liability); Sheffield v. American Indem. Co., 245 S.C. 389, 140 S.E.2d 787, 791 (1965) (husband who received no physical injury may not recover from insurer); Maryland Cas. Co. v. Gordon, 52 Tenn. App. 1, 371 S.W.2d 460, 466 (Ct. App. 1963) (pursuant to limitation of liability policy, insurer is not liable to insured's husband for injuries, spouse's medical expenses, or loss of consortium); Hutton v. Martin, 43 Wash. 2d 574, 262 P.2d 202, 204 (1953) (reference to "each person" in policy pertains to person injured or killed rather than person sustaining damages from an accident); Ryan v. Friede, 18 Wis. 2d 138, 118 N.W.2d 208, 211 (1962) (where husband and wife were injured in same accident policy limit relating to single accident applies).

[42] 245 S.C. 389, 140 S.E.2d 787 (1965). The plaintiff's wife obtained a default judgment in the amount of $30,000 for injuries sustained by her in an accident caused by an uninsured motorist. Her insurance carrier paid her $10,000 in full settlement of her claims under the "per person" limits clause of her uninsured motorist policy. Her husband also obtained a judgment against the uninsured motorist in the amount of $15,000 for consequential damages in the form of loss of his wife's consortium. 140 S.E.2d at 788.

[43] 140 S.E.2d at 790.

[44] *Id.* at 790-91.

vices Automobile Association v. Warner[45] where the California appeals court construed a standard automobile liability insurance policy.[46] The plaintiff claimed an amount above the per person limit for care and loss of services resulting from his spouse's bodily injuries.[47] He contended that because his wife's injuries consequently injured him, two "persons" were injured, thereby expanding the applicable limits of the policy to $100,000.[48] The California court rejected this argument, holding specifically that the "per person" limitation clause referred to the "person" suffering bodily injury in the accident itself.[49]

The departure in *Pearthree II* from the previously established rule was unnecessary, since the outcome of the case did not necessitate such a broad holding. Nevertheless, the brief statement by the court may dramatically affect insurance litigation in Mississippi. *Pearthree II* radically expands the limits of liability under uninsured motorist policies by writing out the per person limits whenever the injured person has a relative who suffers damages consequential to the bodily injuries sustained in the accident itself. For example, where a decedent who had uninsured motorist coverage with limits of $50,000/$100,000 is killed by an uninsured motorist, his policy would now provide coverage to his widow and child as if it were a $100,000/$100,000 policy.[50]

Even more ominous is the potential effect of *Pearthree II* on standard automobile liability insurance policies. Since per person limits of liability clauses in these policies are substantially similar to the per person clauses in uninsured motorist endorsements, and since they are construed similarly, *Pearthree II* may be authority for multiplying the per person limits in a standard liability policy times the number of claimants, regardless of whether those claimants actually sustained bodily injuries in the accident.[51]

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[45] 64 Cal. App. 3d 957, 135 Cal. Rptr. 34 (Ct. App. 1976).

[46] The policy limited liability to $50,000 per person and $100,000 per accident. *Id.* at 960, 135 Cal. Rptr. at 36.

[47] *Id.* at 961, 135 Cal. Rptr. at 36.

[48] *Id.* at 963, 135 Cal. Rptr. at 37.

[49] *Id.* at 964, 135 Cal. Rptr. at 38.

[50] There is some question as to whether or not *Pearthree II* will double the per person limits in situations involving personal injuries only, as opposed to death. If personal injuries to one member of a household result in damages to other family members for loss of care or consortium, however, there is no reason that the *Pearthree II* holding should not apply to that situation as well.

[51] This is by no means clear. The rationale of the court in *Pearthree II* was that because Pearthree was an "insured" she was a separate "person" for limits of liability purposes. The provisions of a tortfeasor's liability policy would include neither an injured plaintiff nor members of his family suffering consequential damages. For this rea-

It does not appear from the opinion that the court intended to alter uninsured motorist law as significantly as it apparently has done. As stated previously, the holding was unnecessary to the disposition of the appeal. Nevertheless, *Pearthree II* has placed Mississippi in the unique position of disregarding per person limitation clauses in the majority of situations involving uninsured motorist claims. Furthermore, at its next opportunity the court should more specifically detail the elements of damage and proof thereof, both in wrongful death actions brought pursuant to the statute and in analogs to a wrongful death action brought against an uninsured motorist carrier. It is respectfully submitted that the Supreme Court should reconsider its decision in *Pearthree II* when these issues are again before the court.

Guy T. Gillespie, III

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son, the rationale of *Pearthree II* would not necessarily apply.

On the other hand, limits of liability clauses in uninsured motorist and liability policies are usually worded and construed similarly, and the effect of *Pearthree II* on uninsured motorist coverage might well be applied similarly to liability coverage. *See* note 41 *supra*.

PROPERTY

During the 1980 term, the Mississippi Supreme Court decided approximately thirty-three cases which involved property law. Although most of the decisions were predictable in light of precedent in those areas, some were especially interesting,[1] and five have been noted in the following text. These five cases were chosen from diverse areas of property law.

I. Reservations of Minerals in Quitclaim Deeds

In 1980, the Mississippi Supreme Court considered whether a grantor is precluded from asserting title to minerals which are reserved in a quitclaim deed when the same fractional share is outstanding in a third party.[2] In *Rosenbaum v. McCaskey,*[3] I.A. Rosenbaum, Sr. conveyed certain land to T.S. McCaskey by quitclaim deed, reserving a one-half interest in the mineral rights of part of the tract. At the time of the conveyance, a one-half mineral interest in the tract was outstanding in a third party.[4] The heirs of Rosenbaum[5] filed suit to remove clouds and confirm title to an undivided one-fourth interest in all oil, gas, and minerals in the tract. The complainants alleged that the reservation was an additional severance of one-half of the one-half interest (one-fourth) I.A. Rosenbaum, Sr., owned. The defendants claimed that the reservation was merely an exception of the one-half interest outstanding in the third party.[6]

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[1] *See, e.g.,* James v. Jackson Prod. Credit Ass'n, 389 So. 2d 494, 497 (Miss. 1980) (claim against resulting trust will be barred unless brought within 10 years after it becomes enforceable); Campbell v. Dedeaux, 386 So. 2d 713, 715-16 (Miss. 1980) (without actual notice to other cotenants, cotenant, who has exercised complete control over cotenancy and has failed to divide profits, has not ousted other cotenants and cannot claim property through adverse possession or through tax sale to third party who conveys to controlling cotenants); Florida Gas Exploration Co. v. Searcy, 385 So. 2d 1293, 1297 (Miss. 1980) (recitals of outstanding mineral interests within deed of trust in mineral interest purchaser's chain of title constitutes constructive notice to purchaser of outstanding mineral interest and defeats purchaser's claim of priority); Sims v. Douglas, 381 So. 2d 617, 619 (Miss. 1980) (grantor's wife does not have homestead rights which preclude specific performance under sales contract where grantor listed property with real estate agency and married before sales contract was executed); Stebbins v. Hayes, 379 So. 2d 898, 902-03 (Miss. 1980) (claim against resulting trust must be brought within 10 years after claim becomes enforceable or it will be barred); Cranford v. Shelton, 378 So. 2d 652, 654-55 (Miss. 1980) (doubtful that Miss. Code Ann. § 97-23-29 (1972) applies to modern cause of action for enticement from a lease; plaintiff-lessor may rely upon common law action where his lessee has been enticed from a lease).

[2] The court noted that this was a case of first impression. Rosenbaum v. McCaskey, 386 So. 2d 387, 389 (Miss. 1980).

[3] 386 So. 2d 387 (Miss. 1980).

[4] At the time of the conveyance, Rosenbaum owned the entire surface and one-half of the mineral rights. Rosenbaum previously had conveyed a one-half mineral interest in the tract to W.G. Terry. *Id.* at 388.

As a general rule, if land is conveyed by warranty deed and the grantor retains a one-half mineral interest when a one-half mineral interest is outstanding in a third party, the grantee acquires the entire surface and a one-half mineral interest while the grantor is left with no mineral interest.[7] The seminal case setting forth this general rule is *Duhig v. Peavy-Moore Lumber Co.,*[8] in which a grantor conveyed the surface by warranty deed and retained a one-half mineral interest when there was a one-half mineral interest outstanding in a third party.[9] The Texas Supreme Court held in favor of the grantee under the warranty deed, confirming in the grantee title to the one-half mineral interest.[10] The opinion in *Duhig* presented two rationales in arriving at this result. Commissioner Smedley, writing for the court, *personally* viewed the problem as one of construction and, resorting to the "established rules of construction,"[11] concluded that the parties intended the deed to convey a one-half mineral interest to the grantee and further intended to withhold, through the reservation clause, the

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[5] I.A. Rosenbaum devised all his estate to I.A. Rosenbaum, Jr., Maude R. Fliegelman, and Sidney Rosenbaum, the appellants in this case. The appellees were successors in title to T.S. McCaskey. *Id.*

[6] *Id.* The bill was dismissed with prejudice in the Chancery Court of Wayne County. *Id.*

[7] *See* Rosenbaum v. McCaskey, 386 So. 2d at 388-89 (stating general rule that if conveyance is by warranty deed, grantor conveys entire surface and one-half the minerals, leaving himself with no interest); 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 311, at 578.24 (1978) (grantee and third party have a one-half interest, both to the exclusion of the grantor); Barber, *Duhig to Date: Problems in the Conveyancing of Fractional Mineral Interests,* 13 Sw. L.J. 320, 329-30 (1959) (courts have favored grantee in solving the "insufficient fraction" problem). *But see* Gibson v. Pickett, 256 Ark. 1035, 512 S.W.2d 532, 536-38 (1974) (where artless deed drawn by layman, court found that warranty and habendum clause indicated that no mineral interest was intended to be conveyed).

Where there is no valuable consideration to support the deed, the Louisiana Supreme Court has held that the loss falls on the grantee, notwithstanding the warranty. Continental Oil Co. v. Tate, 211 La. 852, 30 So. 2d 858, 859-60 (1947).

[8] 135 Tex. 503, 144 S.W.2d 878 (1940).

[9] 144 S.W.2d at 878.

[10] *Id.* at 879-80.

[11] *Id.* at 879.

one-half interest outstanding in the grantor's predecessor in title.[12] Other courts have adopted this construction theory,[13] which calls for an examination of the language of the deed to determine the parties' intent as to whether any mineral interest is conveyed.[14] The majority in *Duhig,* however, based its opinion upon the principle of estoppel.[15] The majority concurred with Commissioner Smedley's finding that the parties intended to convey the one-half mineral interest to the grantee, but the majority further found that the reservation clause retained one-half the minerals in the grantor while at the same time a one-half mineral interest was outstanding in a third party. The court concluded that this retention, which left no minerals that could be conveyed, was a breach of warranty at the time of delivery of the deed to the grantee of the one-half mineral interest intended to be conveyed to the grantee. The court held that the grantor was estopped from asserting title to the one-half mineral interest.[16] This estoppel was analogized to

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[12] *Id.* at 879-80.

[13] *See* Brown v. Kirk, 127 Colo. 453, 257 P.2d 1045, 1046-47 (1953) (grantor clearly excepted 50% of minerals and conveyed 50% of minerals); Murphy v. Athans, 265 P.2d 461, 464 (Okla. 1953) (parties clearly intended that grantor convey entire tract, less one-half interest). For a discussion of Mississippi's early encounters with the construction theory, see note 21 *infra.*

[14] The construction theory adopted by Commissioner Smedley in *Duhig* was based upon the "established rules of construction." 144 S.W.2d at 879. The Colorado Supreme Court enunciated the general rule of construction which Commissioner Smedley applied through the use of his construction theory. The court stated that "[i]t is a universally accepted principle of law that when a deed is unambiguous and unequivocal the intention of the parties thereto must be determined from the deed itself." Brown v. Kirk, 127 Colo. 453, 257 P.2d 1045, 1046 (1953). This is the rule in most jurisdictions. *See, e.g.,* United States v. Sea Gate, Inc., 397 F. Supp. 1351, 1360 (D.N.C. 1975) (fundamental principle that intent of parties to a deed can only be derived from deed itself when deed's language is clear); Gardner v. Fliegel, 92 Idaho 767, 450 P.2d 990, 993-94 (1969) (parties' intent to be ascertained from the instrument itself where instrument unambiguous). This rule of construction also has been adopted in Mississippi. *See* King v. Jones, 199 Miss. 666, 676, 24 So. 2d 860, 863 (1946) (where deed is unambiguous, the parties' intent as to the meaning and purpose of the deed must be derived from the deed itself).

[15] 144 S.W.2d at 880-81.

[16] *Id.* The court quoted from the Michigan Supreme Court:

> When one assumes, by his deed, to convey a title, and by any form of assurance obligates himself to protect the grantee in the enjoyment of that which the deed purports to give him, he will not be suffered afterwards to acquire or assert a title, and turn his grantee over to a suit upon his covenants for redress. The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance. This is merely refusing him the countenance and assistance of the courts in breaking the assurance which his covenants had given.

Id. at 880 (quoting Smith v. Williams, 44 Mich. 240, 6 N.W. 662, 662 (1880)). The court the doctrine of estoppel by deed against an assertion of after-acquired property which precludes a grantor from later asserting title to property which he has conveyed.[17] Although Commissioner Smedley's construction theory has been partially adopted in finding for the grantee[18] in the "insufficient fraction"[19] situation, most courts have followed the

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emphasized that the doctrine prohibits the assertion of title in breach of the warranty. 144 S.W.2d at 880.

For a general discussion of *Duhig* and its implications, see 1 H. Williams & C. Meyers, *supra* note 7, § 311, at 578.26-578.29; Comment, *The After-Acquired Title Doctrine and Mineral Conveyances,* 38 Miss. L.J. 84, 90-91 (1966).

[17] In an article written before his election to the bench, Justice Ethridge stated succinctly the rule regarding estoppel by deed:

> A warranty deed containing a covenant of general warranty, both at common law and under Mississippi statute, operates to estop the grantor from asserting an after-acquired title or interest in the land for the estate which the deed purports to convey, as against the grantee and those claiming under him.

Ethridge, *The After-Acquired Property Doctrine and Its Application in Mississippi,* 17 Miss. L.J. 153, 153 (1945). *See* Perkins v. Kerby, 308 So. 2d 914, 918 (Miss. 1975) (grantor estopped to vary assurances of conveyances); Walters v. Merchants & Mfrs. Bank, 218 Miss. 777, 782, 67 So. 2d 714, 716 (1953) (warranty in deed carries with it after-acquired title obtained by the grantor); Meyers v. American Oil Co., 192 Miss. 180, 186, 5 So. 2d 218, 220 (1941) (well established in Mississippi that grantors of a warranty deed are estopped from denying that they were seized of the property conveyed); *cf.* Buchanan v. Stinson, 335 So. 2d 912, 913 (Miss. 1976) (estoppel by deed founded upon principles of equitable estoppel); Crooker v. Hollingsworth, 210 Miss. 636, 642, 46 So. 2d 541, 544 (1950) (same). Although the estoppel rule is based upon statute, Miss. Code Ann. § 89-1-33 (1972), the common law rule was the same in Mississippi. *See* Fletcher v. Wilson, 9 Miss. (1 S. & M.) 376, 389 (1843) (where grantor conveys land and later perfects title, the title will inure to the grantee). For a discussion of the history of estoppel by deed at common law, see 29 Miss. L.J. 353, 353-55 (1958).

Estoppel by deed is largely based upon: (1) the covenants of warranty, *see, e.g.,* Holmes v. Countiss, 195 Ark. 1014, 115 S.W.2d 553, 556 (1938) (no estoppel unless covenant of warranty); Crawfordsville Trust Co. v. Elston Bank & Trust Co., 216 Ind. 596, 25 N.E.2d 626, 636 (1940) (where deed is without a covenant of warranty, grantor conveys only what he presently owns); Egnor v. Roberts, 118 W.Va. 671, 191 S.E. 532, 534 (1937) (covenant of general warranty passes subsequently acquired property); (2) the covenant of quiet enjoyment, *see* Smith v. Williams, 44 Mich. 240, 6 N.W. 662, 662 (1880) (grantor estopped to assert after-acquired title where covenant of quiet enjoyment is in the deed); or (3) the covenant against encumbrances, *see, e.g.,* First State Bank v. Mussigbrod, 83 Mont. 68, 271 P. 695, 701 (1928) (grantor estopped to claim title where deed conveyed land as security for mortgage and mortgagee later foreclosed); Home Owners' Loan Corp. v. Guaranty Title Trust Co., 168 Tenn. 118, 76 S.W.2d 109, 111 (1934) (same). *See generally* 3 American Law of Property §§ 15.18, 15.19 (A.J. Casner ed. 1952) (discussion of after-acquired property doctrine).

[18] *See* note 13 and accompanying text *supra.*

[19] According to one commentator, the insufficient fraction problem, stated in question form, is: "Where the fractional mineral interest which a grantor owns is insufficient to satisfy both the fractional mineral interest which his warranty deed purports to con-

general theory of breach of warranty, if not adopting the estoppel theory expressly.[20] The decisions of the Mississippi Supreme Court have been in accord with the general rule[21] as announced in *Duhig.* The Mississippi court, however, has based its decisions upon a superiority of warranty obligation theory, rather than the estoppel theory of *Duhig.*[22]

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vey and the one which it purports to exclude, what quantum of mineral interest passes to the grantee?" Barber, *supra* note 7, at 329 (footnote omitted).

[20] *See, e.g.,* Continental Oil Co. v. Tate, 211 La. 852, 856, 30 So. 2d 858, 859 (1947) (discussing warranty theory in dictum); Body v. McDonald, 79 Wyo. 371, 334 P.2d 513, 515-18 (1959) (grantor's successors estopped from claiming grantees had no interest in minerals).

The *Duhig* rule has not been accepted without some disfavor. Justice Alexander, dissenting in Salmen Brick & Lumer Co. v. Williams, 210 Miss. 560, 50 So. 2d 130 (1951), asserted that the grantor should retain title to minerals he has reserved; a conveyance is not affected by the warranty and there is no reason to protect judicially a grantor from a breach of warranty suit. *Id.* at 576-77, 50 So. 2d at 136-37. Justice Alexander's dissent has not gone uncriticized. *See* 1 H. WILLIAMS & C. MEYERS, *supra* note 7, § 311, at 578.30 (stating that Justice Alexander's view is unpersuasive). The Texas Supreme Court also has shown its disdain for its *Duhig* rule, calling it a "novel one," unsupported by the cases cited in its favor. McMahon v. Christmann, 157 Tex. 403, 303 S.W.2d 341, 345 (1957). The Texas court, however, has applied the *Duhig* rule since *McMahon. See* Miles v. Martin, 159 Tex. 336, 321 S.W.2d 62, 64-65 (1959) (grantor estopped to claim title to minerals warranted in deed where such action would cause grantor to breach his warranty).

[21] The general rule in Mississippi is that:

> When a grantor conveys land by warranty deed there passes to the grantee title to all of the fee except that which is expressly reserved or excepted. If, therefore, a grantor conveys and warrants the land less and except a one-half mineral interest, at a time when a one-half mineral interest is outstanding in a third party, the grantor conveys all that he owns and retains nothing for himself.

Ewing, *Reservation and Exception of Minerals in Mississippi Conveyancing,* 39 MISS. L.J. 39, 60 (1967).

The general rule has been developed in several Mississippi cases. In the two earliest cases, the court seemed to be interpreting the factual intent of the parties instead of establishing a rule of law. In Richardson v. Moore, 198 Miss. 741, 22 So. 2d 494 (1945), the court held that the circumstances showed that the grantors were attempting to protect their warranty by reserving mineral rights to the surface and that they were not trying to retain the minerals themselves. *Id.* at 750-52, 22 So. 2d at 496. By looking to intent and to the grantor's warranty, the court appeared to be moving toward the two theories later presented in *Duhig.* The court, in Fatheree v. McCormick, 199 Miss. 248, 24 So. 2d 724 (1946), held that a conveyance of the grantor's undivided interest in certain land, except one-half of all mineral rights (which was outstanding in a third party), was merely a description of what the grantor was conveying; the grantor did not intend to retain an interest. *Id.* at 250-53, 24 So. 2d at 724-25. For a general discussion of the cases listed in this note and in note 22, see Ewing, *supra,* at 61-65.

[22] *See, e.g.,* Rosenbaum v. McCaskey, 386 So. 2d at 389 (rationale of Mississippi rule

The superiority of warranty obligation is similar to the estoppel theory of *Duhig*. The difference in the theories appears to be the level at which the preclusion to assert title is enforced. Under the estoppel rule, the grantor is not allowed to assert title to the minerals he has warranted; whereas, under the Mississippi rule, the court turns a deaf ear to the grantor's assertions in order to protect him from a lawsuit on his warranty.[23] Regardless of which theory is applied, the result, which turns on the warranty by the grantor, will be the same.

The issue in *Rosenbaum* centered on the effect of a mineral reser-

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being superiority of warranty obligation over reservation rights); Lucas v. Thompson, 240 Miss. 767, 773, 128 So. 2d 874, 877 (1961) (reaffirming superiority of warranty obligation over reservation rights); Brannon v. Varnado, 234 Miss. 466, 469, 106 So. 2d 386, 387 (1958) (warranty obligation comes before reservation rights); Garraway v. Bryant, 224 Miss. 459, 464, 80 So. 2d 59, 60 (1955) (grantor warranted title to all minerals he had to convey; thus grantor retained nothing); Salmen Brick & Lumber Co. v. Williams, 210 Miss. 560, 573, 50 So. 2d 130, 135 (1951) (*Duhig* consistent with equitable estoppel but estoppel not applied; reasoning of cases relying upon a judicial protection of warranty theory more appropriate). *See generally* Ewing, *supra* note 21, at 64 (breach of warranty emphasized heavily in holding for grantee); Comment, *supra* note 16, at 91 (importance of warranty obligation relied on by the Mississippi court); 23 MISS. L.J. 64, 64-66 (1951) (analyzing the *Salmen Brick* decision).

The Mississippi Supreme Court has also applied the general rule where special warranty deeds were involved. *See* Merchants & Mfrs. Bank v. Dennis, 229 Miss. 447, 454, 91 So. 2d 254, 256 (1956) (general rule applies to special warranty deeds where grantor recognizes grantee's rights in the minerals by a statement in the deed that royalties received were to be used to reduce grantee's indebtedness).

MISS. CODE ANN. § 89-1-35 (1972) provides:

> The words "warrant specially," in a conveyance, shall constitute a covenant that the grantor, his heirs and personal representatives, will forever warrant and defend the title of the property unto the grantee and his heirs, representatives, and assigns, against the claims of all persons claiming by, through, or under the grantor.

The Mississippi Supreme Court has held that the words "warrant specially" only warrant title against those claiming through the grantor. Jones v. Metzger, 132 Miss. 247, 255, 96 So. 161, 162 (1923). The court has declared that a special warranty deed is "little more than a quitclaim deed which extends to bind the grantor, his heirs and personal representatives." Turner v. Miller, 276 So. 2d 690, 693 (Miss. 1973).

[23] Justice Alexander, dissenting in *Salmen Brick*, stated:

> I am unable to find support in a theory by which a court seeks gratuitously to save a grantor against an anticipated suit for breach of warranty . . . . [W]e are saying to [grantor]: Regardless of what you said [in the deed], we think it best to take your reserved half mineral interest and give it to [grantees] because it is better for you to surrender this interest than that you be exposed to embarrassment or litigation.

Salmen Brick & Lumber Co. v. Williams, 210 Miss. 560, 576-77, 50 So. 2d 130, 136-37 (1951).

vation in a quitclaim deed.[24] The Mississippi Supreme Court has ruled that a quitclaim deed, although containing no warranty, is as effective as a warranty deed to convey the grantor's title.[25] Generally, estoppel by deed does not apply to quitclaim deeds because of the lack of warranties. Therefore, the after-acquired property doctrine is inapplicable to quitclaim conveyances.[26] The general rule, however, has been abrogated by a Mississippi statute which provides that estoppel to assert title to after-acquired property applies to conveyances by quitclaim deeds.[27] In 1957, the statutory estoppel rule was neutralized somewhat in *McLaurin v. Royalties, Inc.*[28] In that case, a grantor conveyed his entire interest in an estate to a third party and later quitclaimed his mineral interest to the predecessors in title of the claimants. Subsequently, the third party conveyed the entire estate back to the grantor. The claimants asserted that the grantor's successors were estopped to assert title in the minerals under the statutory edict.[29] The court concluded that the grantor had no interest when the quitclaim deed was executed and that he intended to convey no interest.[30] Relying on the rule that the estoppel is co-extensive with the interest conveyed,[31] the court held that the grantor was not estopped to assert an after-acquired title and that such after-acquired title did not inure to the benefit of the grantee's successors.[32]

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[24] Before *Rosenbaum,* commentators speculated as to the action courts would take in a *Rosenbaum*-type situation. *See* 1 H. Williams & C. Meyers, *supra* note 7, § 311.1, at 583-84 (question seems to turn on whether the jurisdiction requires a warranty for estoppel by deed to apply); Ewing, *supra* note 21, at 65 (stating the two probable holdings of the Mississippi court when confronted with this issue).

[25] Chapman v. Sims, 53 Miss. 154, 169 (1876). Two Mississippi statutes pertain to conveyances by quitclaim deed: "[a] conveyance without any warranty shall operate to transfer the title and possession of the grantor as a quitclaim and release." Miss. Code Ann. § 89-1-37 (1972); "[a] conveyance of quitclaim and release shall be sufficient to pass all the estate or interest the grantor has in the land conveyed." *Id.* § 89-1-39.

[26] *See, e.g.,* Klamath Land & Cattle Co. v. Roemer, 12 Cal. App. 3d 613, 618, 91 Cal. Rptr. 112, 115 (Ct. App. 1970) (general rule that quitclaim deed does not pass after-acquired property); Turner v. Miller, 276 So. 2d 690, 693 (Miss. 1973) (at common law, estoppel inapplicable where quitclaim involved); 3 American Law of Property § 15.19 (A.J. Casner ed. 1952) (same); Ethridge, *supra* note 17, at 155 (rule originates from view that fee is not passed, only the "right, title and interest" of grantor is passed); Annot., 58 A.L.R.3d 345, 360 (1974) (where quitclaim deed given, estoppel inapplicable at common law).

[27] Miss. Code Ann. § 89-1-39 (1972) provides "[a] conveyance of quitclaim and release . . . shall estop the grantor and his heirs from asserting a subsequently acquired adverse title to the lands conveyed."

The Mississippi Supreme Court has held that the estoppel is co-extensive with the estate, right or interest which the conveyance purports to pass. *See* Bramlett v. Roberts, 68 Miss. 325, 327, 10 So. 56, 56 (1890) (estoppel co-extensive); McInnis v. Pickett, 65 Miss. 354, 357, 3 So. 660, 661 (1888) (same).

[28] 231 Miss. 240, 95 So. 2d 105 (1957).

[29] *Id.* at 245, 95 So. 2d at 107.

[30] *Id.* at 248, 95 So. 2d at 109.

Similarly, the court in *Rosenbaum* found for the grantor and held that the grantor retained the mineral interest reserved in the quitclaim deed.[33] It noted that the grantee must look to the chain of title to ascertain what interest the grantor had to convey by a quitclaim deed and subtract whatever is expressly reserved. The court further noted that since no covenant of warranty was present, the grantor had no duty to protect the conveyance against outstanding interests in the chain of title. Finding the deed to be unambiguous in reserving the one-half mineral interest to the grantor, the court asserted that there was nothing remaining in the estate for the grantee.[34] It also pointed out that the doctrine of estoppel to assert an after-acquired title was not applicable. The court found that the quitclaim deed did not convey the interest the grantor retained and, therefore, the grantor's successors were not estopped to assert title to that interest since it was "neither conveyed nor subsequently acquired."[35]

The rationale of the *Rosenbaum* decision is sound assuming that, as was pointed out, nothing was conveyed.[36] If the court had looked deeper into the intention of the parties, however, it could have easily found that the grantor intended to convey a one-half mineral interest to the grantee using the construction theory presented in *Duhig.*[37] By stating that estoppel does not apply since nothing was conveyed, the court is implying that if the parties did in fact intend to convey the one-half mineral interest, estoppel would apply. Since intent played such an important role in *McLaurin,* the *Rosenbaum* court should have analyzed the parties' intent. Without searching the parties' intent, however, the Mississippi court reversed the established trend, at least in the quitclaim situation, and found for the grantor.

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[31] *See* note 26 *supra.*

[32] 231 Miss. at 245-48, 95 So. 2d at 107-09. The *McLaurin* decision has not gone without criticism. Commenting on the holding in *McLaurin,* one author has asserted that "[s]ometimes in order to render justice 'bad law' results." 29 MISS. L.J. 353, 354 (1958) (footnote omitted). The author further states that in order to avoid the *McLaurin* rule the grantee should demand that the words "which I now own or should subsequently acquire" be added after the words of conveyance in a quitclaim deed. *Id.* at 355.

Cases forerunning *McLaurin* which influenced the court call for a more equitable application of the estoppel of the quitclaim statute. *See* Crooker v. Hollingsworth, 210 Miss. 636, 643-45, 46 So. 2d 541, 544-45 (1950) (where grantor in quitclaim deed later acquires title to the same property as a mere conduit for someone else, never intending to acquire the property himself, it would not be equitable to apply the statutory estoppel rule); McInnis v. Pickett, 65 Miss. 354, 357, 3 So. 660, 661 (1888) (quitclaim deed which conveyed land inherited from father did not purport to convey subsequent inheritance from brothers and sisters who likewise inherited from father; therefore, grantor under quitclaim deed not estopped to assert title later acquired by descent from co-heirs).

[33] Rosenbaum v. McCaskey, 386 So. 2d at 389. The court did award the grantee a one-fourth mineral interest, however, since the evidence showed that the grantor intended to convey this interest and the appellants admitted this in the appeal. *Id.* at 390.

[34] *Id.*

[35] *Id.*

[36] *Id.* at 390.

II. PARTITION

During 1980, the Mississippi Supreme Court considered the question whether the partition of a joint tenancy is available after the joint tenants have obtained a divorce decree affecting the property. In *Welborn v. Welborn,*[38] Barbara Welborn and her husband, James, owned certain property as joint tenants.[39] Barbara was awarded a divorce from her husband in March, 1978. In the divorce decree, the chancellor granted Barbara the exclusive use and occupancy of the "marital dwelling and yard" and granted James the exclusive use and occupancy of the tract's "pastures, farmlands, and buildings."[40] Barbara filed a petition for partition in April, 1979. The chancellor dismissed the petition on James' motion which alleged that the divorce decree had settled the parties' rights with respect to the property and that his homestead rights precluded a partition of the property.[41]

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[37] The construction theory was available to the court because no warranties were present in the quitclaim deed. Usually, in finding for the grantee, the court is faced with a situation which arises under a warranty deed and the court disposes of the case under a superiority of warranty obligation theory. *See* notes 21, 22 and accompanying text *supra.* The general rule upon which the construction theory is based has been adopted in Mississippi. *See* note 14 *supra.* Therefore, it seems that the court had an obligation to examine the parties' intent as evidenced by the deed. The court, however, failed to examine the intent of the parties stating: "the quitclaim deed from Rosenbaum to McCaskey is unambiguous. It reserves or retains unto Rosenbaum an undivided one-half mineral interest in the entire 40 acre tract and transfers to McCaskey whatever is left—in this case, the surface." 386 So. 2d at 389.

[38] 386 So. 2d 722 (Miss. 1980).

[39] The property subject to the partition suit comprised approximately 75 acres and was encumbered by a mortgage securing an indebtedness to the Mississippi Veterans' Farm and Home Board, also a party to the suit. *Id.* at 723.

[40] *Id.* The appeal was from the Chancery Court of Hinds County.

[41] *Id.* The chancellor sustained the motion without hearing testimony, basing the dismissal on the grounds that a partition would defeat the ex-husband's rights granted to him under the divorce decree and his homestead rights. *Id.*

Joint tenancies, recognized at common law,[42] exist as a single estate in real or personal property which is owned by two or more persons under one instrument or act of the parties.[43] Each tenant has an undivided share in the entire estate with equal entitlement to the enjoyment of the land, its rents and profits.[44] Through the right of survivorship, a distinguishing characteristic of joint tenancies,[45] the deceased joint tenant's share vests in the survivors until there is only one remaining survivor in whom the entire estate vests.[46] There is a noticeable trend in the United States, by use of statutes and judicial construction, to abolish the right of survivorship and construe joint tenancies as tenancies in common.[47] Although joint tenancies with right of survivorship are recognized by statute in Mississippi,[48] the right of survivorship has received judicial disfavor.[49]

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[42] At common law, conveyance of an estate to two or more persons would be considered a joint tenancy if the four unities of time, title, possession, and interest were present. If the estate was conveyed to a married couple and all four unities were present, this would result in a tenancy by the entirety. An estate which lacked any of the four unities was a tenancy in common. 3 W. BLACKSTONE, COMMENTARIES *180-86, 191-94.

Joint tenancies were favored at common law. Wolfe v. Wolfe, 207 Miss. 480, 487-88, 42 So. 2d 438, 438 (1949); 4A R. POWELL, THE LAW OF REAL PROPERTY ¶ 615, at 664 (1979). Joint tenancies were favored because they allowed estates to remain unbroken. Wolfe v. Wolfe, 207 Miss. at 488, 42 So. 2d at 438; 4 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 1775, at 8 (repl. 1961); Note, *Joint Tenancy and Tenancy by the Entirety, Four Unities Requirement,* 36 KY. L.J. 202, 207 (1948); 2 CUM.-SAM. L. REV. 241, 242 (1971). Joint tenancies also aided the performance of feudal duties by vesting property ownership in one person through operation of the right of survivorship. *Id.* at 242.

The four unities are required under modern law to form a joint tenancy in Mississippi. *E.g.,* Bird v. Stein, 102 F. Supp. 399, 402 (S.D. Miss. 1952) (unities of possession, title, interest, and time required for joint tenancy), *rev'd on other grounds,* 204 F.2d 122 (5th Cir. 1953); Wilder v. Currie, 231 Miss. 461, 474, 95 So. 2d 563, 567 (1957) (same).

The distinction between a joint tenancy and a tenancy by the entirety has been blurred by the Mississippi Supreme Court. For an excellent discussion of this phenomenon and its history in Mississippi, see 48 MISS. L.J. 352, 355-58 (1977).

[43] 4 G. THOMPSON, *supra* note 42, § 1776, at 12.

[44] *Id.* at 12-13.

[45] *See* Vaughn v. Vaughn, 238 Miss. 342, 349, 187 So. 2d 620, 622 (1960) (provision for survivorship is strong evidence of the creation of a joint tenancy).

[46] Bird v. Stein, 102 F. Supp. 399, 403 (S.D. Miss. 1952), *rev'd on other grounds,* 204 F.2d 122 (5th Cir. 1953); 4A R. POWELL, *supra* note 42, ¶ 618, at 677 (1979); 4 G. THOMPSON, *supra* note 42, § 1776, at 13. To some extent, joint tenants are fiduciaries among themselves. *Id.*

[47] 4 G. THOMPSON, *supra* note 42, § 1775, at 6 (Supp. 1978); *see* 4A R. POWELL, *supra* note 42, ¶ 616, at 668 (language often construed to create tenancy in common for life with contingent remainder in fee for survivor); 39 YALE L.J. 912, 912 (1930) (preference for tenancy in common because of statutory and judicial disfavor of joint tenancies). *See* note 49 and accompanying text *infra.*

Joint tenancies may be terminated in several ways.[50] One of the

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[48] MISS. CODE ANN. § 89-1-7 (1972) provides:

> All conveyances or devises of land made to two or more persons, including conveyances or devises to husband and wife, shall be construed to create estates in common and not in joint tenancy or entirety, unless it manifestly appears from the tenor of the instrument that it was intended to create an estate in joint tenancy or entirety with the right of survivorship. But an estate in joint tenancy or entirety with the right of survivorship may be created by such conveyance from the owner or owners to himself, themselves or others, or to himself, themselves and others.

[49] *See, e.g.*, Bird v. Stein, 102 F. Supp. 399, 402 (S.D. Miss. 1952) (although joint tenancies not favored, they have not been abolished in Mississippi), *rev'd on other grounds*, 204 F.2d 122 (5th Cir. 1953); O'Connor v. Dickerson, 188 So. 2d 241, 245 (Miss. 1966) (joint tenancies not favored in Mississippi); Cross v. O'Cavanagh, 198 Miss. 137, 151, 21 So. 2d 473, 476 (1945) (same).

Since the time of the first Mississippi statute providing for joint tenancies, *see* REV. MISS. CODE ch. 36 art. 18 (1857), the Mississippi Supreme Court has disfavored joint tenancies. *See* Hemingway v. Scales, 42 Miss. 1, 18 (1868) (the statute and common law concept of tenancies will be strictly construed). The court has reiterated its holding in *Hemingway* in subsequent cases. *E.g.*, W.C. Ellis & Co. v. Walker, 101 Miss. 326, 331, 58 So. 97, 99 (1912) (at death of one spouse, other became sole owner of land therein described); Gresham v. King, 65 Miss. 387, 390, 4 So. 120, 121 (1888) (same); McDuff v. Beauchamp, 50 Miss. 531, 535 (1874) (same).

The supreme court may be retreating from its disfavor of joint tenancies. In Shepherd v. Shepherd, 336 So. 2d 497 (Miss. 1976), the court held that, upon divorce, a tenancy by the entirety would not be held by the parties as tenants in common, but the parties instead would hold the property as joint tenants with the right of survivorship. *Id.* at 499.

[50] A joint tenancy may be terminated by mutual agreement of the parties or by conduct of the joint tenants which indicates that the tenancy has been dissolved. Bishop v. United States, 338 F. Supp. 1336, 1343 (N.D. Miss. 1970), *aff'd*, 468 F.2d 950 (5th Cir.), *cert. denied*, 409 U.S. 878 (1972); Shepherd v. Shepherd, 336 So. 2d 497, 499 (Miss. 1976). Partition by agreement is provided for by statute in Mississippi:

> Partition of land held by adult joint tenants . . . may be made by agreement, which shall be evidenced by writing, signed by the parties, and containing a description of the particular part allotted to each, and recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be binding and conclusive on the parties. They may also bind themselves by written agreement to submit the partition to the arbitrament of one or more persons to be chosen by them, and to abide the partition made by the arbitrators and the articles of submission; and the written award shall be recorded in the office of the clerk of the chancery court of the proper county or counties, and shall be final and conclusive between the parties, unless made or procurred [sic] by fraud.

MISS. CODE ANN. § 11-21-1 (1972).

Where there are more than two joint tenants and one conveys his share, the grantee most common methods is the judicial procedure of partition,[51] which is provided for by statute in Mississippi.[52] When land is partitioned, either by agreement or judicial means, the parties' unity of possession is severed and no new or additional title is created.[53] In Mississippi, there are two methods of partition. The land may be partitioned in kind[54] or sold and the proceeds divided among the joint tenants.[55] The chancel-

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becomes a tenant in common with no right of survivorship, but the other joint tenants remain joint tenants with the right of survivorship. *See* Richardson v. Miller, 48 Miss. 311, 333 (1873) (grantee becomes tenant in common with remaining joint tenants); 4A R. POWELL, *supra* note 42, ¶ 618, at 672-73 (grantee is tenant in common while other concurrent owners remain joint tenants). *But see* Hunter v. Hunter, 320 S.W.2d 529, 534-35 (Mo. 1959) (where conveyance made by one of two joint tenants, the joint tenancy was not severed).

[51] "[T]he purpose of partition . . . [is] to provide a means by which people, finding themselves in an unwanted common ownership can free themselves from the relationships incidental to such a common ownership." 4A R. POWELL, *supra* note 42, ¶ 609, at 636. *See* Harrison v. Prather, 404 F.2d 267, 271 (5th Cir. 1968) (partition allows joint tenants to enjoy and possess property in severalty). A common law suit for partition of a joint tenancy does not depend upon the existence of a prior legal wrong, and the suit may be heard as a matter of right at the request of any joint tenant subject only to equitable considerations. Cobb v. Gilmer, 365 F.2d 931, 933 (D.C. Cir. 1966).

[52] MISS. CODE ANN. § 11-21-3 (1972) provides:

> Partition of land held by joint tenants . . . having an estate in possession or a right of possession and not in reversion or remainder, whether the joint interest be in the freehold or in a term of years not less than five, may be made by decree of the chancery court of that county in which the lands or some part thereof, are situated; or, if the lands be held by devise or descent, the division may be ordered by the chancery court of the county in which the will was probated or letters of administration granted, although none of the lands be in that county.
>
> However, any person owning an indefeasible fee simple title to an undivided interest in land may procure a partition of said land and have the interest of such person set apart in fee simple free from the claims of life or other tenants, . . . and other known living persons having an interest in the lands, are made defendants if they do not join in the proceeding as complainants or petitioners.

[53] G. THOMPSON, *supra* note 42, § 1820, at 249.

[54] The law favors a partition in kind because of the unique nature of land. *See* Blake v. St. Catherine Gravel Co., 218 Miss. 713, 716, 67 So. 2d 712, 714 (1953) (partition in kind favored); Wright v. Ingram-Day Lumber Co., 195 Miss. 823, 831, 17 So. 2d 196, 198 (1944) (particular land cannot be replaced by any sum).

Where land is partitioned in kind, the land usually is divided into a number of parcels which coincide with the number of joint tenants. Thereafter, each joint tenant is given a parcel and becomes the sole owner. 4A R. POWELL, *supra* note 42, ¶ 612, at 652.

[55] *See, e.g.*, Dailey v. Houston, 246 Miss. 667, 684, 151 So. 2d 919, 927 (1963) (sale appropriate only where it would promote the interests of the parties more effectively); Jefcoat v. Powell, 235 Miss. 291, 300, 108 So. 2d 868, 871 (1959) (same); Hilbun v. Hilbun, 134 Miss. 235, 238, 98 So. 593, 594 (1924) (same); Smith v. Stansel, 93 Miss. 69, 71-

lor has the discretion to decide which method to use.[56]

In the instant case, the Mississippi Supreme Court held that the husband's contention that his homestead rights in the jointly owned property prevented partition was without merit.[57] The court concluded that the only Mississippi homestead statute which limits partition[58] was inapplicable since both parties were living.[59] The supreme court has on other occasions found the right to partition superior to homestead rights.[60] The holding in *Welborn* regarding homesteads was obviously one of necessity, since one of the divorced parties could have precluded forever the other party's absolute right to partition[61] simply by asserting homestead rights. As a result, divorced joint tenants would

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72, 46 So. 538, 539 (1908) (sale proper where partition in kind cannot be made).

[56] *See* Dailey v. Houston, 246 Miss. 667, 684, 151 So. 2d 919, 927 (1963) (chancellor in his discretion may order only part of the lands sold which are sought to be partitioned). The chancery court is limited somewhat in its discretion, however, since the Mississippi Supreme Court finds partition by sale more of a last resort than a viable alternative to partition in kind. *See* Smith v. Stansel, 93 Miss. 69, 71, 46 So. 538, 539 (1908) (partition in kind preferable to partition by sale; sale is ordered only when it would promote interests of parties more effectively).

[57] Welborn v. Welborn, 386 So. 2d at 724.

[58] Miss. Code Ann. § 91-1-23 (1972) provides:

> Where a decedent leaves a widow to whom, with others, his exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during her widowhood as long as it is occupied or used by the widow, unless she consent. Likewise, where a decedent leaves a widower to whom, with others, her exempt property, real and personal, descends, the same shall not be subject to partition or sale for partition during the period of his being a widower as long as it is occupied or used by the widower, unless he consent.

[59] 386 So. 2d at 724. The court also found inapplicable Miss. Code Ann. § 27-33-3 (1972), which provides for tax exemptions of homesteads, because the statute in no way affected joint tenants' right to partition property. 386 So. 2d at 723.

[60] *See* Solomon v. Solomon, 187 Miss. 22, 26, 192 So. 10, 10 (1929) (where cotenant died leaving his share to his widow, the other cotenants were entitled to partition because the statute prohibiting partition of widow's homestead does not include situation where husband was cotenant with others; their right to partition not withdrawn because of statutory homestead rights in this instance); *cf.* Blackmon v. Blackmon, 350 So. 2d 44, 47 (Miss. 1977) (divorce decree did not create homestead rights in property held in tenancy in common that would prevent a partition of the property by the cotenant in possession). For a general discussion of the homestead rights of cotenants as affecting partition, see Annot., 140 A.L.R. 1170 (1942).

[61] *See* Barnes v. Rogers, 206 Miss. 887, 893, 41 So. 2d 58, 60 (1949) (partition is absolute right in Mississippi, even if others are inconvenienced). The Mississippi rule is in accord with the generally accepted view. *See* Baston v. Graham, 236 Ala. 72, 181 So. 260, 263 (1938) (partition is a matter of right); Condrey v. Condrey, 92 So. 2d 423, 426 (Fla. 1957) (same).

have been trapped needlessly in an undesirable relationship, thereby defeating the purpose of partition.[62]

In *Welborn,* the supreme court also held that the divorce decree, which granted the joint tenants the exclusive use of particular improvements and areas of the joint tenancy, did not affect the right to partition the property.[63] It is well-settled in Mississippi that a divorce decree does not, in itself, affect the parties' title to their property.[64] Moreover, a chancellor cannot divest title to property from one party and vest title in the other party in a divorce proceeding.[65] Following these established rules, the court in *Welborn* concluded that the exclusive use provision granted to James Welborn in the divorce decree did not create any permanent right in him "in derogation of the right" of the other joint tenant.[66] The *Welborn* court obviously was buttressed by its decision in *Blackmon v. Blackmon,*[67] in which the court held that an exclusive use provision in a divorce decree did not preclude the partition of a tenancy in common.[68] The court in *Blackmon* found that the spouse was not endowed with any property right through the divorce decree;[69] therefore, the status of the parties as tenants in common with an undivided one-half interest remained the same.[70] The Mississippi Surpeme Court was presented its first opportunity to decide the property right versus partition right question in *Blackmon.* Although the *Blackmon* court found the property right argument "appealing,"[71] its decision that partition was available clearly set the tone for the *Welborn* decision. The property right argument may have been even more appealing to the court in *Welborn,* in light of the responding joint tenant's interest in obtaining the entire estate through the right of survivorship. The *Welborn* court, however, wisely followed precedent established in *Blackmon* and adhered to the right of partition by divorced spouses owning jointly held property.

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[62] *See* note 51 *supra.*

[63] 386 So. 2d at 724-25.

[64] *See, e.g.,* Blackmon v. Blackmon, 350 So. 2d 44, 46 (Miss. 1977) (rule that divorce does not sever joint tenancy is well established in Mississippi); Miller v. Miller, 298 So. 2d 704, 706 (Miss. 1974) (same).

[65] Rosamond v. Rosamond, 250 Miss. 742, 749, 168 So. 2d 294, 297 (1964) (absent statute, court has no power to deal with vested property rights of spouse); McCraney v. McCraney, 208 Miss. 105, 107, 43 So. 2d 872, 873 (1950) (court lacked authority to divest a party of his title by judicial fiat or decree in a divorce proceeding). *But cf.,* Mahaffey v. First Nat'l Bank, 231 Miss. 798, 817, 97 So. 2d 756, 763 (1957) (court does have power to enforce a transfer of title in divorce action pursuant to a consent decree).

[66] 386 So. 2d at 725.

[67] 350 So. 2d 44 (Miss. 1977).

[68] *Id.* at 45-46. The court noted that the argument of a separate property right in the divorced spouse was "appealing." *Id.* at 45.

[69] *Id.* at 46.

[70] *Id.* at 45. The court remarked that the petitioner "clearly" came within the purview of MISS. CODE ANN. § 11-21-3 (1972), which provides for judicial partition in Mississippi. 350 So. 2d at 45. The court also noted that the petitioner, by filing a petition to modify the divorce decree, could have chosen a method of partition other than through the statutory judicial means. *Id.* at 46.

As a result of its holding in *Welborn* and *Blackmon,* the Mississippi Supreme Court is in accord with the majority of other courts which have dealt with partition and divorce.[72] The court's holdings have also firmly established the superiority of partition rights over other legal rights such as those granted by divorce and homestead rights. In *Lynch v. Lynch,*[73] the court held that the only requisite to partition is cotenancy of the subject matter to be partitioned.[74] The court has evidenced that it intends to adhere to this basic premise in all questions pertaining to the availability of partition. Although joint tenancies are not favored,[75] the court has shown that joint tenancy rights will not be compromised where they exist.

III. Doctrine of Worthier Title

In *All Persons v. Buie,*[76] the Mississippi Supreme Court concluded that the doctrine of worthier title remains in force as a rule of construction in Mississippi.[77] In July, 1929, T.J. Cupit conveyed a life estate in a certain tract of land[78] to his son, Clarence Cupit, and his daughter-in-law, Mabel, with a remainder to the heirs of the body of Clarence upon their deaths.[79] In January, 1933, T.J. Cupit executed another deed intending to make "absolute" the title in Clarence and Mabel. In March, 1940, Clarence died intestate and without issue, leaving Mabel as his only heir at law. Mabel filed suit in September, 1977, to confirm title in herself.[80] "All persons"[81] contested the suit claiming title under a reversionary interest in T.J. Cupit.[82]

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[71] 350 So. 2d at 45.

[72] *See, e.g.,* Renwick v. Renwick, 52 Ill. App. 3d 701, 367 N.E.2d 1009, 1011 (1977) (error to dismiss counterclaim in divorce action for partition of marital dwelling which was held by the parties in joint tenancy); Reed v. Reed, 516 S.W.2d 568, 570 (Mo. Ct. App. 1974) (upon divorce, tenancy in entirety became tenancy in common, and either party was entitled to partition); Kyzyma v. Kyzyma, 117 N.J. Super. 472, 285 A.2d 76, 77 (Ch. 1971) (joint bank account was subject to partition by divorced wife against divorced husband); *In re* Marriage of Lesser, 28 Or. App. 377, 559 P.2d 532, 534 (1977) (partition available to each ex-spouse where they held property as tenants in common after divorce); Shoup v. Shoup, 469 Pa. 165, 364 A.2d 1319, 1322-23 (1976) (same); *cf.* Porter v. Porter, 238 Md. 640, 210 A.2d 513, 514 (1965) (sale and division of proceeds of property held by a divorced couple as tenants in common did not violate the ex-husband's constitutional rights). *But see* Gajewski v. Gajewski, 52 A.D.2d 735, 382 N.Y.S.2d 177, 178 (1976) (right to partition not absolute in New York where tenancy in common results from parties' divorce).

[73] 196 Miss. 276, 17 So. 2d 195 (1944).

[74] *Id.* at 282, 17 So. 2d at 196. *See* Barnes v. Rogers, 206 Miss. 887, 893, 41 So. 58, 60 (1949) (tenants in common with right of possession have absolute right to partition, no matter how much inconvenience involved).

[75] *See* notes 47, 49 and accompanying text *supra.*

[76] 386 So. 2d 1109 (Miss. 1980).

The modern rule of worthier title provides that when a grantor conveys a life estate in land with a remainder to his heirs, the grantor will retain a reversionary interest in the land and the remainder will be inoperative unless a contrary intent is shown.[83] To meet the requirements of the *inter vivos* branch of this rule,[84] there must be an *inter vivos* transfer and a limitation to the heirs of the grantor.[85] Usually, the limitation is by remainder, but there is no restriction as to the type of interest that can be limited. The limitation to the heirs may be either equitable or legal,[86] subject to a condition precedent,[87] or subject to a power of appointment.[88]

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[77] *Id.* at 1112.

[78] The land was located in Jefferson County, Mississippi. This appeal was taken from the Chancery Court of Jefferson County. *Id.* at 1110.

[79] The conveyance read: "[F]or and during the term of each of their natural lives to the heirs of the body of said Clarence Cupit in fee simple at the death of both." *Id.*

[80] The grantee, Mabel Cupit, is now Mabel Buie, the appellee. *Id.*

[81] All persons, the appellants, were identified as anyone who, through inheritance from T.J. Cupit, would have claimed an interest in the tract of land under consideration. *Id.* at n.l.

[82] All persons asserted that the first deed created a life estate in Clarence and Mabel, with a reversionary interest in the heirs of T.J. Cupit, and that T.J. Cupit could not alienate or divest this reversionary interest by the second deed in January, 1933. *Id.* at 1111.

[83] L. SIMES, FUTURE INTERESTS § 26, at 56 (2d ed. 1966); 1 AMERICAN LAW OF PROPERTY § 4.19, at 441 (A.J. Casner ed. 1974).

An example of the application of the doctrine would include the situation in which "*A* conveys land to '*B* for life, remainder to the heirs of *A*.' [T]he effect is to give *B* a life estate and a reversion in fee simple is left in *A*. The limitation to the heirs is void." L. SIMES, *supra,* § 28, at 59 (footnote omitted). When *A* conveys land in a situation in which the worthier title doctrine is applicable, and *A* later conveys the land to *C, C's* heirs would acquire title to the land to the exclusion of the heirs of *A*. *Id.* at 60. The doctrine is not applicable, however, when *A* conveys a life estate to *B* remainder to *C* and his heirs, even though *C* is an heir to *A* on *A's* death. For the doctrine to be operative, a conveyance of land must include the words "to the heirs of the grantor" or other similar language. 1 AMERICAN LAW OF PROPERTY, *supra,* § 4.20, at 442.

One should distinguish between the type of conveyance which initiates the rule of worthier title and that which creates a fee tail. A fee tail is a limitation to a person and his lineal descendants usually created by the language "[to *A* and] the heirs of his body." Reilty v. Huff, 335 S.W.2d 275, 280 (Tex. Civ. App. 1960). *See* Hertz v. Abrahams, 110 Ga. 707, 36 S.E. 409, 415 (1960) (fee tail is estate of inheritance passing by lineal descent); Morehead v. Goellert, 160 Kan. 598, 164 P.2d 110, 112 (1945) (same); *cf.* Bodine's Adm'r v. Arthur, 91 Ky. 53, 14 S.W. 904, 905 (1890) (since fee tail limits inheritance to particular heirs, it is distinguishable from a life estate with remainder).

Originally the doctrine was considered a rule of law which nullified a limitation over to the grantors.[89] Today, however, most jurisdictions

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Fee tails have been abolished by statute in Mississippi: "Estates in fee tail are prohibited; and every estate which, but for this statute, would be an estate in fee tail, shall be an estate in fee simple." MISS. CODE ANN. § 89-1-15 (1972). *See* Liberty Bank v. Wilson, 116 Miss. 377, 379, 77 So. 145, 146 (1917) (fee simple created by conveyance to woman and heirs of her body under statute prohibiting fee tail); Dibrell v. Carlisle, 48 Miss. 691, 706 (1873) (statute converts a fee tail created by limitation to grantee and heirs of his body into fee simple).

[84] Actually, the doctrine consists of two branches. The rule stated in the text is the *inter vivos* branch. The testamentary branch of the doctrine provides that when an estate which is devised to an heir of the testator is identical in quality and quantity to the estate which would have passed to the heir by descent had the testator died intestate, the estate will be deemed to have passed by descent rather than by devise. Although the testamentary branch of the doctrine was very important in earlier times, it appears to be obsolete in modern law. 3 R. POWELL, THE LAW OF REAL PROPERTY ¶ 381, at 306-07 (1979). For a discussion of the testamentary branch of the doctrine of worthier title, see Comment, *The Doctrine of Worthier Title in Arkansas,* 21 ARK. L. REV. 394, 395-404 (1967); Comment, *The Doctrine of Worthier Title: The Effect of Article 1291a,* 16 BAYLOR L. REV. 429, 432-35 (1964).

[85] L. SIMES, *supra* note 83, § 27, at 57-58; 1 AMERICAN LAW OF PROPERTY, *supra* note 83, § 4.20, at 442.

[86] *See* Green v. City Bank Farmers Trust Co., 72 N.Y.S.2d 442, 443-46 (Sup. Ct. 1947) (equitable estate limited to heirs); Richardson v. Richardson, 272 A.D. 321, 71 N.Y.S.2d 1, 1-2 (1947) (legal estate limited to heirs).

[87] *See* Adams v. Adams, 147 Fla. 267, 2 So. 2d 855, 859 (1941) (reversion limited by election of wife); Norman v. Horton, 344 Mo. 290, 126 S.W.2d 187, 190 (1939) (grant created contingent class remainders in the alternative).

[88] *See* Fidelity Union Trust Co. v. Parfner, 135 N.J. Eq. 133, 37 A.2d 675, 677 (Ch. 1944) (in default of settlor's power of appointment, corpus to go to heirs).

[89] MISSISSIPPI LAW INSTITUTE ON REAL PROPERTY LAW 186 (1962). *See* 3 R. POWELL, *supra* note 84, ¶ 381, at 311 (as a rule of law the doctrine operated irrespective of grantor's intent).

The doctrine of worthier title was important to overlords in feudal England because it protected certain incidents of feudal tenure applicable to property and valuable to the overlord, such as wardship and marriage. If property passed to an heir by descent, such incidents passed also. If the property passed by grant, or purchase, as in a remainder, the incidents were not involved. Johanson, *Reversions, Remainders and the Doctrine of Worthier Title,* 45 TEX. L. REV. 1, 3 (1966); *cf.* 3 R. POWELL, *supra* note 84, ¶ 381, at 305 (basis for rule is that title by descent is worthier than title by grant); L. SIMES, *supra* note 83, § 26, at 56 (same). *See also* Wright, *Medieval Law in the Age of Space: Some* treat the doctrine as a rule of construction.[90] Where the doctrine is held to be a rule of construction, the grantor's intent is of primary importance.[91] Normally, the question is whether the grantor intended to leave a reversion or create a remainder in his heirs.[92] The presumption is that a reversion was intended.[93] In *Harris v. McLoran,*[94] the Mississippi Supreme Court, treating the doctrine as a rule of law, held that the remainder limited to the grantor's heirs was void.[95] The court asserted that the heirs would take by descent and not by purchase.[96] In *All Persons,* however, the supreme court held that since the doctrine had not been abolished by the Mississippi Legislature, it continued to "remain active as a rule of construction."[97] As a result of this case it is

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"Rules of Property" in Arkansas, 22 ARK. L. REV. 248, 259 (1968) (overlord would be entitled to recover the payment of relief if title passed by descent).

[90] *See, e.g.,* Wilcoxen v. Owen, 237 Ala. 169, 185 So. 897, 902-03 (1938) (words "heirs at law" often designate next of kin); Dreyer v. Lange, 74 Ariz. 39, 243 P.2d 468, 470-71 (1952) (no restrictions can be placed on grantor except where instrument conveys future interest based on contingency); Braswell v. Braswell, 195 Va. 971, 81 S.E.2d 560, 563 (1954) (heirs intended to mean beneficiaries). The seminal case establishing the doctrine as a rule of construction was Doctor v. Hughes, 225 N.Y. 305, 122 N.E. 221, 221 (1919).

[91] One commentator has remarked that:

> Since this approach contemplates that a grantor *can* create a remainder in his heirs if that is his intent, the question in every case becomes: According to the language of the conveyance, did the grantor intend to create a remainder in his heirs, or was he simply providing for a reversion in himself or his estate?

Johanson, *supra* note 89, at 9 (emphasis in original).

Because the doctrine of worthier title is a rule of construction, a limitation to the heirs of a grantor will be construed as a reversion in the grantor unless there is some other indication of the grantor's intent, such as qualifying language or circumstances. Where it is evident that the grantor intended for his heirs to take as purchasers, the grantor's intention will be given such effect and the limitation will be construed as creating a remainder in the grantor's heirs. SIMES & SMITH, THE LAW OF FUTURE INTERESTS § 1605, at 500 (2d ed. 1956).

[92] *See* MISSISSIPPI LAW INSTITUTE ON REAL PROPERTY LAW, *supra* note 89, at 186-87 (problem is whether words designate indefinite line of descent from grantor or whether language identifies limited number of devisees who would take on grantor's death if grantor was intestate); *see* note 89 *supra.*

[93] SIMES & SMITH, *supra* note 91, § 1611, at 516. The problem of construction arises in determining what language will rebut the presumption. *Id.*

The doctrine of worthier title can exist in three forms as a rule of construction: (1) with a prima facie preference for the finding of a reversion; (2) as a problem of original inquiry untouched by any presumption; or (3) with a prima facie preference for the finding of a remainder. 3 R. POWELL, *supra* note 84, ¶ 281, at 311-14.

[94] 30 Miss. 533 (1855).

[95] *Id.* at 570.

[96] *Id.*

[97] 386 So. 2d at 1112.

clear that the rule of law application of the doctrine is no longer viable in Mississippi. Although the doctrine remains active in Mississippi, it has been abolished judicially[98] and by statute[99] in other jurisdictions.

In confirming title to the property in Mabel Buie,[100] the Supreme Court in *All Persons* reached the correct result but used the wrong methods. The doctrine of worthier title was not applicable in *All Persons* since the language of the deed created a remainder in the heirs of the body of the *grantee.*[101] For the doctrine to be applicable, the words in the instrument must specify that the limitation applies to the heirs of the grantor or there must be words of similar effect.[102] As a rule of construction, the basis of the doctrine is the grantor's intent as evidenced in the deed of how he wishes his heirs to take.[103] In the instant case, however, the grantor left a remainder interest in the grantee's heirs and the problem of how the grantor wished *his* heirs to take was not a consideration. The court obviously based its decision upon the assumption that, since the grantee was the grantor's son, their heirs would be the same; thus, the doctrine applied. As previously stated, the court did reach the correct result. By creating a remainder contingent on the grantee's producing issue, the grantor retained a reversion in himself.[104] Mississippi, by statute, permits the conveyance of a future interest.[105] Thus, the conveyance by the grantor of his reversion to the grantees did in fact give them the grantor's interest. This did not, however, vest a fee simple absolute title in the grantees because contingent remainders are not destructible in Mississippi.[106] The fee simple absolute vested in Mabel Buie when Clarence Cupit died and there was no longer any possibility of the grantee producing issue; therefore, the contingency failed.

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[98] *See* Hatch v. Riggs Nat'l Bank, 361 F.2d 559, 564 (D.C. Cir. 1966) (doctrine abolished in District of Columbia; no need to get into morass of the doctrine).

[99] *E.g.,* MINN. STAT. ANN. § 500.14(4) (West 1945) (certain remainders vest by purchase); NEB. REV. STAT. §§ 76-114, -115 (1976) (doctrine of worthier title abolished). The rule was abolished in England in 1833 by the Act for the Amendment of the Law of Inheritance, 3 & 4 Wm. 4, c. 106, § 3 (1833).

The California Law Revision Commission gave three reasons for abolishing the doctrine of worthier title in a 1959 report:

> (a) The doctrine is based on a false premise, namely, the assumption that a person granting property to his own heirs or next of kin does not really intend to give the property to them or understand that he has done so but rather intends to retain a reversion in the property with full power to dispose of it again in the future;
>
> (b) The doctrine breeds litigation since the presumption or rule of interpretation can be defeated by a showing that the grantor actually meant what he said;
>
> (c) The doctrine can easily operate as an estate and inheritance tax trap by creating a reversionary interest in the estate of a grantor who intended to avoid such taxes by making an inter vivos transfer of the property to his heirs or next of kin.

Stanton, *Law Revision,* 34 CAL. B.J. 84, 93-94 (1959). For a discussion of the tax ramifications of the doctrine of worthier title before 1966, see Johanson, *supra* note 89, at 16-42.

[100] 386 So. 2d at 1112.

[101] *Id.* at 1110.

[102] 1 AMERICAN LAW OF PROPERTY, *supra* note 83, § 4.20, at 442.

[103] *See* notes 91, 92 and accompanying text *supra.*

In *All Persons*, the Mississippi Supreme Court seemed to waiver between the application of the doctrine of worthier title and the application of the correct rule. This is apparent because, under the doctrine, a finding that the grantor intended to retain a remainder[107] should have eliminated a finding of any remainder in the grantee's heirs.[108] Nevertheless, the court found that there was a "contingent reversionary interest" in the grantor after the first conveyance.[109] The court asserted that the contingency rested on there being no living issue of the grantees after the death of one of the grantees.[110] In reference to the possibility of there being an issue of the grantee which would defeat the grantor's reversion, the court alluded to the proper method of deciding the case.[111] The court, however, stated that through the doctrine of worthier title, the second deed to the grantees vested them with fee simple title to the estate.[112]

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[104] *Cf.* City Savings Bank & Trust Co. v. Cortwright, 122 Miss. 75, 83, 84 So. 136, 137 (1920) (reversionary interest remains in testator when life estate with contingent remainder is devised in a will).

[105] Miss. Code Ann. § 89-1-1 (1972) provides:

> Any interest in or claim to land may be conveyed to vest immediately or in the future, by writing signed and delivered; and such writing shall have the effect to transfer, according to its terms, the title of the person signing and delivering it, with all its incidents, as fully and perfectly as if it were transferred by feoffment with livery of seizin, notwithstanding there may be an adverse possession thereof.

See Hemphill v. Mississippi State Highway Comm'n, 245 Miss. 33, 44, 145 So. 2d 455, 460 (1962) (all restraints on *inter vivos* transfer of present and future interests removed by statute); Buchanan v. Buchanan, 236 Miss. 751, 756, 112 So. 2d 224, 227 (1959) (instrument may convey future interest under statute).

[106] By statute, Mississippi prohibits the destruction of contingent remainders:

> Nor shall the alienation of any particular estate on which a remainder may depend, whether such alienation be by will or other writing, nor the union of such particular estate with the inheritance, by purchase or by descent, so operate, by merger or otherwise as to defeat, impair, or in any way affect such remainder.

Miss. Code Ann. § 89-1-17 (1972). *See* City Savings Bank & Trust Co. v. Cortwright, 122 Miss. 75, 84-85, 84 So. 136, 138 (1920) (merger of contingent remainder and life estate in holder of fee precluded by this statute; contingent remainder not destructible).

[107] "By his action in giving the second deed, it was obvious that the grantor T.J. Cupit understood that he was vested with the contingent remainder which was, in his opinion, alienable and one which he could convey away as he did." All Persons v. Buie, 386 So. 2d at 1112.

[108] *See* note 91 *supra*.

[109] 386 So. 2d at 1111.

Through its application of the doctrine of worthier title, the supreme court has muddled this area of the law. Attorneys drafting instruments which incorporate these types of limitations should be especially cognizant of the necessity of including the grantor's intentions within the instrument.

IV. DRAINAGE DISTRICTS

The issue whether drainage districts have the authority to condemn land for recreational purposes was dealt with by the Mississippi Supreme Court in 1980. In *Terry v. Long Creek Watershed Drainage District,*[113] Long Creek Drainage District sought to condemn land partly owned by Walter Terry in order to construct a lake for flood control and recreational purposes.[114] Terry objected to the condemnation, contending that the lake was to cover more area than that needed for flood control and this extra area was to be used solely for recreational purposes.[115]

Drainage districts are organized in Mississippi for the "purpose of reclaiming wet, swamp, or overflowed lands for agricultural and sanitary purposes conducive to public health."[116] Generally, under the state's police powers,[117] a state legislature may provide for the creation of drainage districts in order to promote land value and public health.[118] Because drainage districts are creatures of statute, they are subdivisions of the state and must depend on express statutory grants for power and jurisdiction.[119]

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[110] *Id.*

[111] *See* notes 104 through 106 and accompanying text *supra.*

[112] 386 So. 2d at 1112.

[113] 380 So. 2d 1270 (Miss. 1980).

[114] The lake was to encompass approximately 671 acres. *Id.* at 1271.

[115] Terry contended that of the lake's 671 acres, only 460 acres were needed for flood control, and the remaining 211 acres would be used for recreational purposes. *Id.* at n.2.

[116] MISS. CODE ANN. § 51-31-5 (1972).

[117] *See, e.g.,* Almand v. Drainage Comm'rs, 147 Ga. 532, 94 S.E. 1028, 1031 (1918) (drainage district legislation based upon police powers of state); Great N. Ry. v. Graff, 71 S.D. 595, 28 N.W.2d 77, 80-81 (1947) (state exerted police power in making provision for drainage); Donnelly v. Decker, 58 Wis. 461, 17 N.W. 389, 391-95 (1883) (duty to drain swamps comes from state's police powers).

In Mississippi, local drainage districts are created through a process whereby local landowners within a potential drainage district petition the chancery court for the establishment of a drainage district.[120] After a proper hearing,[121] the chancery court may order the establishment of a drainage district.[122] The court will then appoint three landowners from the district[123] to oversee and administer the district.[124] The landowners within the district are assessed for improvements made to their land[125] and land may be condemned by the commissioners when it is needed for making the improvements.[126]

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[118] *See, e.g.*, Lake Shore & Mich. S. Ry. v. Clough, 242 U.S. 375, 384-85 (1917) (state may exercise police power to public benefit in establishing drainage districts); Hagar v. Reclamation Dist. No. 108, 111 U.S. 701, 704 (1884) (state can provide for drainage districts to improve public health); Carter v. Chuquatonchee Consol. Drain. Dist., 218 So. 2d 30, 33 (Miss. 1969) (legislature intended for consolidated drainage districts to administer and improve drainage canals in their respective districts); Board of Supervisors v. Grable, 111 Miss. 893, 895, 72 So. 777, 778 (1916) (legislature has power to provide for drainage to increase land values and promote health).

[119] *See* Eden Drain. Dist. v. Swaim, 212 Miss. 386, 397, 54 So. 2d 547, 549 (1951) (drainage district is subdivision of state with powers limited to those expressly granted by statute); Standard Oil Co. v. National Sur. Co., 143 Miss. 841, 854, 107 So. 559, 560 (1926) (same). *But see* Moorhead Drain. Dist. v. Pedigo, 210 Miss. 284, 293, 49 So. 2d 378, 381 (1950) (watersheds have implied powers from their enabling statutes to carry out their purposes). *See generally* 21 MISS. L.J. 165, 165-66 (1949).

[120] *See* MISS. CODE ANN. § 51-29-5 (1972) (providing for the establishment of drainage districts with local commissioners). Subdistricts may also be formed under the authority of § 51-29-115. *See generally* Annot., 69 A.L.R. 266, 285-88 (1930) (discussing constitutionality of statute for establishment of drainage district because it imposes nonjudicial duties on a court).

[121] *See* MISS. CODE ANN. § 51-29-9 (1972) (providing for hearing of petition to create drainage district). Upon presentation to the chancellor, however, of a petition "signed by a majority of the landholders owning one third of the land, or by one third of the landholders owning a majority of the land, praying that the improvements be made," the chancellor is required to order the establishment of the drainage district "without further inquiry." *Id.* § 51-29-11.

[122] *See id.* § 51-29-13 (order of chancery court establishing a drainage district has the effect of a judgment and may be appealed).

[123] *Id.* § 51-29-15 (Supp. 1980). No appeal is allowed from the order appointing commissioners. Elmore v. Alexander, 160 Miss. 361, 366, 134 So. 144, 145 (1931). The order appointing the commissioners should be made subsequent to the order establishing the drainage district. *Id.* at 366, 134 So. at 145.

Drainage districts also may be organized under county commissioners appointed by the county board of supervisors. *See* MISS. CODE ANN. § 51-31-9 (1972) (county board of supervisors must appoint three commissioners in counties where there are drainage districts or counties where drainage districts have been proposed); *id.* § 51-31-37 (organization of drainage district upon confirmation of report of commissioners).

[124] *See* MISS. CODE ANN. § 51-29-19 (1972) (establishing duties of commissioners).

In *Terry* the Mississippi Supreme Court held that a drainage district could not condemn land for recreational purposes alone.[127] Rejecting Long Creek's argument that the power to condemn land for recreational purposes could be implied from the statute conferring additional powers to drainage districts,[128] the court concluded that since there was no specific mention of recreational purposes in the statutes giving drainage districts the power to condemn lands, no such power existed.[129] The court clarified its holding, however, stating that land already condemned for a valid purpose was not prohibited from then being used for recreational purposes.[130]

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[125] *See id.* § 51-29-29 (Supp. 1980) (allowing assessments to be made to landowners). Landowners are protected by limiting the assessments to benefits. *See* Peoples Bank Liquidating Corp. v. Beashea Drain. Dist., 199 Miss. 505, 522, 24 So. 2d 784, 787 (1946) (amount of additional drainage district bonds should not exceed sum of benefits assessed); *cf.* Toler v. Bear Creek Drain. Dist., 141 Miss. 851, 862, 106 So. 88, 90 (1925) (equality of benefits not essential to formation of district).

[126] *See* MISS. CODE ANN. § 51-29-35 (1972) (providing for condemnation of land within district). The commissioners may also acquire land by appraisal. The commissioners appraise the value of land, and if the landowner makes no objection, this amount is given over to the landowner, and title is vested in the drainage district. *See id.* § 51-29-39 (1972) (providing for appraisal process of acquiring land by drainage district commissioners).

[127] 380 So. 2d at 1272-73.

[128] *Id.* Mississippi statutory authority provides that in order to improve water and soil conservation, both the drainage districts with local commissioners and those with county commissioners have the power "[t]o take necessary measures for prevention of erosion, floodwater and sediment damage; to further the conservation, development, utilization and disposal of water." MISS. CODE ANN. § 51-33-3 (1972). Long Creek argued that under the holding in Moorhead Drain. Dist. v. Pedigo, 210 Miss. 284, 49 So. 2d 378 (1950), drainage districts had the implied power to carry out their purposes in the district, *id.* at 293, 49 So. 2d at 381, and that therefore the statute providing for the additional powers for further development and utilization, MISS. CODE ANN. § 51-33-3 (1972), gave the commissioners the implied power to condemn for recreational purposes. The court rejected this argument, asserting that Long Creek could carry out its flood control purposes without taking private land for recreational uses. 380 So. 2d at 1272.

[129] 380 So. 2d at 1272. Long Creek cited MISS. CODE ANN. § 51-31-143 (1972), which provides that the chapter conferring powers to drainage districts with county commissioners is to be liberally construed. The court, however, declared that such construction must be within the purposes of the statute, and found no recreational purposes in the statute. 380 So. 2d at 1272. The court also cited Roberts v. Mississippi State Highway Comm'n, 309 So. 2d 156 (Miss. 1975), which held that statutes granting power of eminent domain must be construed strictly when the right to condemn is doubtful. *Id.* at 159.

[130] 380 So. 2d at 1272.

The court's ruling in *Terry* is undoubtedly correct when considered under the premise that since drainage districts are subdivisions of the state, all their powers must come from express statutory grant.[131] In rejecting Long Creek's arguments, the court could have strengthened its position by pointing out that the statute cited by Long Creek which requires liberal construction of drainage district statutes only applies to the chapter of the Mississippi Code which deals with drainage districts having county commissioners.[132] Long Creek was organized under the chapter pertaining to drainage districts with local commissioners.[133] The decision of the Mississippi Supreme Court is a good one and indicates that the court will adhere to the requirement that the powers exercised by drainage districts must be derived from express statutory grants.

V. EMINENT DOMAIN

In 1980, the Mississippi Supreme Court held that, in a condemnation proceeding, evidence of a comparable sale of land occurring subsequent to the date of the taking is not admissible to prove the value of and the damages to the property.

In *Leflore v. Mississippi State Highway Commission,*[134] a petition for condemnation was filed on May 29, 1978, by the Mississippi State Highway Commission for the purpose of constructing a highway on 20.16 acres of land owned by the Leflores.[135] At the trial, two of the Leflores' witnesses testified to the value of the property before and after the taking, basing their figures on comparable sales of similar property in the area. A third witness for the Leflores was not allowed to testify as to a comparable sale made in September 1978 because it was subsequent to the date of the taking.[136]

The Mississippi Constitution requires that due compensation be paid to the owner of private land when it is taken for public use.[137] The Mississippi Supreme Court has determined that due compensation is made when an owner of a private property is paid the value of the property taken[138] and any damage to the remaining property as a consequence of the taking, without regard to general benefits which inure to the public as a result of the construction of an improvement.[139] The value of the land is to be determined as of the date of the taking.[140] In order to provide a measurement for the payment of due compensation to a property owner, the supreme court in *Mississippi State Highway Commission v. Hillman*[141] devised a formula commonly known as the before and after rule. This rule provides that due compensation is the difference between the fair market value of the land before the taking and the fair market value after the taking.[142] Fair market value, as defined by the court, is the price a willing purchaser would offer and a willing buyer would accept in an open market.[143] Land is to be valued at its highest and best use;[144] however, this does not include speculative and uncertain profits which may be derived from the land.[145] Gen-

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[131] *See* note 119 and accompanying text *supra.*

[132] *See* note 129 *supra.*

[133] *See* MISS. CODE ANN. § 51-29-5 (1972) (authorizing creation of drainage districts).

[134] 390 So. 2d 284 (Miss. 1980).

[135] *Id.* at 285. The land was owned by Oline F. Leflore, Carolyn Leflore Noel, and John L. Leflore, Jr. *Id.*

[136] The appellants objection to the suppression of evidence of this subsequent sale formed the basis for the appeal. *Id.*

[137] Section 17 of the Mississippi Constitution provides that "[p]rivate property shall not be taken or damaged for public use, except on due compensation being first made to the owner or owners thereof." MISS. CONST. art. 3, § 17.

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[138] The taking of land for public use occurs when suit is filed in the special court of eminent domain. *See generally* Miss. Code Ann. §§ 11-27-1 to -91 (1972 & Supp. 1980) (providing eminent domain procedure in Mississippi).

[139] Mississippi State Highway Comm'n v. Hancock, 309 So. 2d 867, 871 (Miss. 1975); Mississippi State Highway Comm'n v. Burwell, 206 Miss. 490, 495, 39 So. 2d 497, 497 (1949); Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 865, 198 So. 565, 569 (1940). Because general benefits to the public are not to be considered, the condemning authority is not entitled to credit against the compensation paid for the enhanced value of any remaining property resulting from the improvement provided by the condemning authority. *See, e.g.,* Mississippi State Highway Comm'n v. Hancock, 309 So. 2d 867, 871 (Miss. 1975) (Highway Commission not entitled to set-off because of enhanced value of remaining property resulting from highway construction); Mississippi State Highway Comm'n v. Chatham, 173 Miss. 427, 433, 161 So. 674, 675 (1935) (no deduction to be made from value of land condemned because of the enhanced value of the remainder). This rule is not applicable in some jurisdictions. *See, e.g.,* Adams v. State, 291 Ala. 224, 279 So. 2d 488, 491 (1973) (effect must be given to enhancement in value of remaining land if the condemnation is for a public highway); State v. Norris, 268 So. 2d 300, 304 (La. Ct. App. 1972) (not abuse of discretion for court in awarding damages to consider enhanced value of remaining land resulting from new road); Michigan State Highway Comm'n v. Frederick, 32 Mich. App. 236, 188 N.W.2d 193, 196-97 (1971) (that new road materially affects the value of remaining land is proper consideration in awarding damages).

[140] *E.g.,* Jackson Mun. Airport Auth. v. Wright, 232 So. 2d 709, 714 (Miss. 1970) (cases of inverse condemnation based upon value at time of taking); Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 595, 172 So. 2d 196, 202-03 (1965) (date of taking held to be date immediately preceding institution of suit). The Mississippi Legislature also has provided by statute that "[e]vidence of fair market value shall be established as of the date of the filing of the petition." Miss. Code Ann. § 11-27-19 (1972).

[141] 189 Miss. 850, 198 So. 565 (1940).

[142] The formula as announced in *Hillman* provides:

> When part of a larger tract of land is taken for public use, the owner should be awarded the difference between the fair market value of the whole tract immediately before the taking, and the fair market value of that remaining immediately after the taking, without considering general benefits or injuries resulting from the use to which the land taken is to be put, that are shared by the general public.

Id. at 866, 198 So. at 569.

[143] *See* Paulk v. Housing Auth., 204 So. 2d 153, 155 (Miss. 1967) (standard used for valuation of land taken by condemnation is value determined by a willing buyer and seller in an open market); Green Acres Memorial Park, Inc. v. Mississippi State Highway Comm'n, 246 Miss. 855, 861-62, 153 So. 2d 286, 289 (1963) (market value is the present cash value as between one wanting to sell and one wanting to buy). In Mississippi, damages to the remaining land are also awarded. *See* note 139 and accompanying text *supra.* One author has suggested that the Mississippi Supreme Court has mistakenly equated the before and after formula with total indemnity for all the landowner's possible losses. Jones, *Just Compensation Via Fair Market Value May Not Include the Kitchen Sink—It Could Be Noncompensable,* 46 MISS. L.J. 1, 5 (1975). Because damages are also recoverable, there are many types of special damages for which the landowner may be compensated. For an excellent discussion of the compensability of special damages, see *id.* at 8-17.

> Among the factors in determining market value of real estate are:
>
> (a) A view of the premises and their surroundings.
>
> (b) A description of the physical characteristics of the property and its situation in relation to points of importance in the neighborhood.
>
> (c) The price at which the land was bought, if sufficiently recent to throw light on present value.
>
> (d) The price at which similar neighboring land has sold at or about the time of the taking.
>
> (e) The opinion of competent experts.
>
> (f) A consideration of the uses for which the land is adapted and for which it is available.
>
> (g) The cost of improvements, if they are such as to increase the value of the land.
>
> (h) The net income from the land, if the property is devoted to one of the uses to which it could be most advantageously and profitably applied.

4 P. NICHOLS, THE LAW OF EMINENT DOMAIN § 12.31[2] (rev. 3d ed. 1980) (footnotes omitted).

[144] *See, e.g.,* New v. Mississippi State Highway Comm'n, 297 So. 2d 821, 823-24 (Miss. 1974) (value must be based upon the highest and best use of property, not upon the condition at which the property is presently maintained); Emerson v. Mississippi State Highway Comm'n, 208 So. 2d 441, 442 (Miss. 1968) (before and after formula based upon property's best or most valuable use); Mississippi State Highway Comm'n v. Brooks, 239 Miss. 308, 316-17, 123 So. 2d 423, 427 (1960) (land value not to be estimated only by referring to present use but by reference to the best or most valuable use to which the property could be reasonably adapted).

[145] *See, e.g.,* Pearl River Valley Water Supply Dist. v. Brown, 182 So. 2d 384, 388 (Miss. 1966) (evidence of remote and speculative uses of land which depend upon the occurrence of extrinsic factors should be excluded from the jury); Mississippi State Highway Comm'n v. Peterson, 242 Miss. 202, 207, 134 So. 2d 743, 744 (1961) (before and after formula does not include speculative and uncertain business profits); Mississippi State

erally, the most favored method of determining the fair market value of condemned property is by a comparison with sales of similar property in the same area.[146] The supreme court has suggested that cross-examination of the witness testifying to the comparable sale is the best means of proving or disproving sufficient similarity.[147] The determination of the sufficiency of similarity is within the discretion of the trial judge.[148] Comparable sales have been held to include the price the condemnee paid for the subject property;[149] however, the prices paid by the condemnor for similar land have been declared inadmissible in determining market value.[150] Although land value is to be appraised as of the date of the taking,[151] the supreme court, in *Mississippi State Highway Commission v. Stout*,[152] held that evidence of a comparable sale occurring after the date of the taking was admissible to prove the fair market value of the land condemned.[153] The court ruled that the jury was properly instructed to consider the possible enhancement of the value of the land sold due to the improvements made by the condemn-

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Highway Comm'n v. Valentine, 239 Miss. 890, 894, 124 So. 2d 690, 692 (1960) (same).

[146] *See, e.g.,* Green Acres Memorial Park, Inc. v. Mississippi State Highway Comm'n, 246 Miss. 855, 865, 153 So. 2d 286, 290 (1963) (recent sale of nearby similar property is admissible to show each market value of the land acquired); Foster v. Mississippi State Highway Comm'n, 244 Miss. 57, 66, 140 So. 2d 267, 270 (1962) (sale to one other than condemnor of similar property admissible to show value); Mississippi State Highway Comm'n v. Rogers, 236 Miss. 800, 807, 112 So. 2d 250, 252 (1959) (sales must be of similar land of like quality and must not be remote in time). *But see* Pearl River Valley Water Supply Dist. v. Wood, 252 Miss. 580, 599, 172 So. 2d 196, 204-05 (1965) (comparable sale does not have to be of land identical to the condemned land).

One author contends that the comparable sale method is "a better test of market value than the speculative opinions of witnesses." 4 P. NICHOLS, *supra* note 143, § 12.311[3].

[147] *See* Pearl River Valley Water Supply Dist. v. Wright, 203 So. 2d 69, 71 (Miss. 1967) (cross-examination of a witness is the proper means of determining whether the comparable sale is similar in size, location, area, improvement, and topography and is not too remote in time).

[148] Highway Dev. Co. v. Mississippi State Highway Comm'n, 343 So. 2d 477, 481 (Miss. 1977).

[149] *See* Mississippi State Highway Comm'n v. Hillcrest Farm, Inc., 252 Miss. 154, 162, 171 So. 2d 491, 494 (1965) (price paid for condemned land is admissible when sale is voluntary and is not too remote in time).

[150] Foster v. Mississippi State Highway Comm'n, 244 Miss. 57, 66, 140 So. 2d 167, 170 (1962); *cf.* Mississippi State Highway Comm'n v. Taylor, 293 So. 2d 9, 10 (Miss. 1974) (sales to agencies with power of eminent domain not admissible to prove market value).

[151] *See* note 140 and accompanying text *supra.*

[152] 242 Miss. 208, 134 So. 2d 467 (1961), *overruled in part,* Leflore v. Mississippi State Highway Comm'n, 390 So. 2d 284, 286 (Miss. 1980).

[153] 242 Miss. at 218, 134 So. 2d at 470.

ing authority.[154] The court asserted that because of the cautionary instruction given to the jury and because the condemnor could have diminished the probative value of the sale by proving any enhancement of the value of the land,[155] the after-taking sale was properly admitted to ascertain the market value of the subject property.[156] The holding in *Stout* is also followed in several other jurisdictions.[157]

In the instant case, the supreme court, emphasizing the rule that damages are to be assessed at the time of the taking, overruled its holding in *Stout* that comparable sales after the taking are admissible.[158] The court concluded that the after-taking sales would have reflected the enhanced value of the land sold due to the improvements made by the condemning authority; therefore, the jury would have considered benefits to which the private landowner was not entitled, notwithstanding any curative instruction.[159]

The court's holding in *Leflore* is reasonable considering that a jury, which ordinarily does not deal with land valuations, could become very confused in attempting to compute the necessary decrease in the price of land sold which would offset any possible enhancement in the value of the land due to the construction of a public improvement. Also, the holding in *Leflore* should have a minimal effect on the jury's ability to valuate land when there are many comparable sales of land occurring before the taking of the subject property. In situations in which there are no comparable sales occurring before the taking, however, the *Leflore* decision may have an adverse effect on the jury's ability to valuate land. For this reason, the supreme court should have provided an exception to its rule in *Leflore* so that evidence of after-taking sales would be admissible to aid the jury in property valuations when there were no comparable sales before the taking of the subject property.[160] The precautions presented in *Stout* could be used to prevent the landowner from being compensated for general benefits, and, as a result, the jury would have access to some very useful evidence in ascertaining land value.

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[154] *Id.,* 134 So. 2d at 470.

[155] *Id.,* 134 So. 2d at 470.

[156] The court recognized the rule in Mississippi that general benefits to the public resulting from the condemning authority's improvement should not be considered in awarding damages in eminent domain proceedings. *Id.,* 134 So. 2d at 470 (citing Mississippi State Highway Comm'n v. Hillman, 189 Miss. 850, 198 So. 565 (1940)).

[157] *See, e.g.,* State v. Hargrove, 282 Ala. 13, 208 So. 2d 444, 446 (1968) (evidence of comparable sale 10 months after condemnation could properly have been admitted); Dash v. State, 491 P.2d 1069, 1077 (Alaska 1971) (comparable sale 15 months after taking by eminent domain admissible); City of Tucson v. Ruelas, 19 Ariz. App. 530, 508 P.2d 1174, 1176 (1973) (sale after date of taking is admissible to prove "before" value of subject property); Maxwell v. Commonwealth, 404 S.W.2d 9, 11-12 (Ky. 1966) (sale 18 months after taking was of probative value in making appraisal); State v. Bryan, 518 S.W.2d 928, 931 (Tex. Civ. App. 1975) (sale subsequent to taking admissible where value involved was not affected by the public improvement). *But see* State v. Christy, 283 So. 2d 533, 535 (La. Ct. App. 1973) (sales of property subsequent to date of taking deemed to have no probative value in ascertaining land value).

[158] 390 So. 2d at 286.

[159] The court asserted that:

> [T]o hold such evidence admissible, even with a cautionary jury instruction or proof of enhancement value, is only to emasculate and confuse the general rule that damages are determined as of the time of the taking and leads to a contradiction of the usual jury instruction concerning the before and after values for the assessment of damages.

Id.

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[160] As one court remarked: "[T]he jury need[s] all the help [it] can get in determining the difficult and delicate question of fair market values." Maxwell v. Commonwealth, 404 S.W.2d 9, 12 (Ky. 1966).

Miscellaneous

During the 1980 term, the Mississippi Supreme Court rendered decisions on various topics, including torts, domestic relations, and trusts, which will be treated textually below.

I. TORTS

The Mississippi Supreme Court handed down several significant decisions in the area of tort law during the 1980 term.[1] Three of these cases merit textual commentary.

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[1] Decisions of lesser import rendered in the 1980 term include: Seedkem S., Inc. v. Lee, 391 So. 2d 990, 995 (Miss. 1980) (doctrine of respondeat superior does not apply when employee deviates from business purpose in furtherance of personal errand, even though employee intends to resume business activity); Hicks v. Greenville Lumber Co., 387 So. 2d 94, 96-97 (Miss. 1980) (party filing construction lien against property owner required to give him notice; plaintiff bringing suit to recover against builder-vendor under an implied warranty of habitability and workmanlike manner of construction must allege that house was new and plaintiff was the first purchaser); City of Meridian v. Webb, 387 So. 2d 85, 87-88 (Miss. 1980) (where automobile stolen because of negligence of bailee, bailor may recover the difference between reasonable market value of automobile on date it was stolen and its reasonable market value on date returned, plus reasonable expenses necessarily incurred by bailor in retrieving it); Barnes v. Town of Burnsville, 385 So. 2d 623, 624 (Miss. 1980) (recovery in tort claim limited to amount sued for); Nathaniel v. City of Moss Point, 385 So. 2d 599, 601 (Miss. 1980) (where no ordinance requires maintenance of traffic control devices at intersections, decision to replace stop sign that had been removed was governmental function of municipality against which, absent statutory provision, there could be no recovery based on negligence); Gaylord's of Meridian, Inc. v. Sicard, 384 So. 2d 1042, 1044 (Miss. 1980) (plaintiff in malicious prosecution case must overcome prima facie evidence that defendant had probable cause to instigate suit as established by conviction in lower court, even though conviction was subsequently reversed); Sears, Roebuck & Co. v. Young, 384 So. 2d 69, 73 (Miss. 1980) (in the absence of malice, wilfulness, or gross negligence, plaintiff must prove genuine physical injury or financial loss to recover for mental anguish); Allen v. Blanks, 384 So. 2d 63, 68-69 (Miss. 1980) (jury question as to intoxication or negligence arises where facts show that investigating police officer felt need to administer breath analysis test; whether driver involved in accident was licensed is inadmissible for purpose of proving lack of due care); Mallette v. Hurt, 383 So. 2d 503, 506 (Miss. 1980) (jury verdict upheld where there was no showing of bias or prejudice on part of jury and award was not so small as to shock conscience of court); Warren v. Smith-Vaniz, 382 So. 2d 1088, 1089 (Miss. 1980) (complainant whose cause has been transferred has 30 days to amend his pleadings or move for additional time; otherwise the cause will be dismissed); Lindsey v. Montez, 382 So. 2d 1085, 1086 (Miss. 1980) (trial court erroneously excluded part of police officer's deposition); Huffman v. Houston Dairy, Inc., 381 So. 2d 1036, 1037 (Miss. 1980) (in action for damages for personal injuries brought by employee, instruction for directed verdict improperly given since evidence was capable of supporting jury's finding

A. *Landowner's Duty to Licensees, Invitees and Trespassers*

Until 1978, Mississippi preserved intact the common law distinctions between invitees,[2] licensees,[3] trespassers,[4] and the landowner's

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of negligence on part of one or both parties); Tucker v. Kelly, 381 So. 2d 1030, 1032 (Miss. 1980) (where damages awarded by jury are not responsive to weight of evidence and jury instructions, it is within trial judge's discretion to order a new trial on issue of damages unless verdict shows bias, passion, or prejudice on part of jury); Astro Transp., Inc. v. Montez, 381 So. 2d 601, 604-05 (Miss. 1980) (where party defends on theory of res judicata, he must prove his defense by offering into evidence either the pleadings or judgment of companion case; weight and credibility to be accorded testimony is for jury to decide); Neshoba County Gin Ass'n (AAL) v. Blackwell Chevrolet Co., 381 So. 2d 168, 169 (Miss. 1980) (where party's negligence is in dispute, a jury question is presented and a directed verdict is error); Watkins v. Ross, 380 So. 2d 1265, 1267 (Miss. 1980) (damages awarded by jury not disturbed in the absence of bias, passion, or prejudice on part of jury); McKlemurry v. University Medical Center, 380 So. 2d 251, 251 (Miss. 1980) (court declined to abolish doctrine of sovereign immunity); Collins v. Black, 380 So. 2d 241, 244 (Miss. 1980) (interference with punitive damages awarded by jury is discouraged unless an exceptional case; party's ability to pay is one of several factors to be considered by jury in setting punitive damages); Pattillo v. Cessna Aircraft Corp., 379 So. 2d 1225, 1227 (Miss. 1980) (court rejected "second accident doctrine," stating that party who caused accident is one against whom recovery may be sought); Harrison v. Smith, 379 So. 2d 517, 519 (Miss. 1980) (where verdict of jury and jury instructions are inconsistent, court should not reform the verdict but instead should require that the jury deliberate further and clarify the verdict); Warren v. City of Gulfport, 378 So. 2d 1098, 1099 (Miss. 1980) (court declined to abolish doctrine of sovereign immunity); Pollam v. Illinois Cent. G.R.R., 378 So. 2d 659, 661 (Miss. 1980) (all jury instructions are to be read and considered together).

[2] "[A]n invitee is a person who goes upon the premises of another in answer to the express or implied invitation of the owner or occupant for their mutual advantage." Hoffman v. Planters Gin Co., 358 So. 2d 1008, 1011 (Miss. 1978) (citing Langford v. Mercurio, 254 Miss. 788, 799-800, 183 So. 2d 150, 154 (1966) and Wright v. Caffey, 239 Miss. 470, 474, 123 So. 2d 841, 842 (1960)), *quoted in* Hughes v. Star Homes, Inc., 379 So. 2d 301, 303 (Miss. 1980). A broader definition is set forth in the RESTATEMENT (SECOND) OF TORTS § 332 (1965):

> (1) An invitee is either a public invitee or a business visitor.
> (2) A public invitee is a person who is invited to enter or remain on land as a member of the public for a purpose for which the land is held open to the public.
> (3) A business visitor is a person who is invited to enter or remain on land for a purpose directly or indirectly connected with business dealing with the possessor of the land.

An independent contractor who enters land on business which concerns the landowner is considered a business invitee. *See* Jackson Ready-Mix Concrete v. Sexton, 235 So. 2d 267; 269 (Miss.) (electrical worker injured when he brought his elbow into contact with an exposed wire was deemed to be a business invitee), *cert. denied,* 400 U.S. 916 (1970);

corresponding duty to each.[5] In 1978, the supreme court announced its

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Ingalls Shipbuilding Corp. v. McDougald, 228 So. 2d 365, 367 (Miss. 1969) (injured employee of independent contractor was a business invitee). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 61, at 385-98 (4th ed. 1971). The business owner's duty to a business invitee is to exercise reasonable care in maintaining the premises in a reasonably safe condition. *See* Mississippi Chem. Corp. v. Rogers, 368 So. 2d 220, 222 (Miss. 1979) (warning by owner to independent contractor's supervisory personnel was sufficient to relieve owner of liability); Mississippi Power Co. v. Brooks, 309 So. 2d 863, 866 (Miss. 1975) (owner has obligation to provide independent contractor with a reasonably safe place to work); General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969) (plaintiff must show that defendant maintained elevator in such a condition that it could reasonably be foreseen that injury would result, or that he failed to give warning of a dangerous condition). The owner is not an insurer and incurs "no liability for injuries caused by conditions which are not dangerous or which are, or should be, known or obvious to the business invitee." *Id. See generally* James, *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees,* 63 YALE L.J. 605, 623-25 (1954) (a business invitee expected to take care of himself). Moreover, an owner is under no duty to protect an independent contractor or its employees from dangers arising from defects that the contractor undertakes to repair. Spruill v. Yazoo Valley Oil Mill, Inc., 317 So. 2d 410, 413 (Miss. 1975) (owner of utility plant not liable for death of independent contractor's employee since accident occurred while employee was repairing a defective transformer).

The Mississippi Supreme Court applied several of the foregoing principles in two cases decided in 1980. In Buford v. Jitney Jungle Stores, 388 So. 2d 146 (Miss. 1980), an independent contractor was injured when, at 4:00 a.m., he tripped over a pipe on a refrigeration unit. He had worked on the refrigeration unit on several prior occasions and had installed the pipe on which he tripped. The independent contractor alleged that Jitney Jungle Stores negligently failed to provide him with a reasonably safe place to work since there were no lights on the refrigeration unit, and had failed to warn him of the danger. *Id.* at 147-48.

In Fortenberry Drilling Co. v. Mathis, 391 So. 2d 105 (Miss. 1980), an employee of an independent contractor was injured while restacking drill collars. It was the duty of Fortenberry Drilling, the drilling contractor and owner of the rig, to keep the stack of drill collars in order. On the day in question, however, the independent contractor's crew, acting pursuant to instructions, undertook the task of restacking. Plaintiff fell when the pipe rack broke, causing the pipes to shift suddenly. Plaintiff contended that the owner of the mineral rights and the drilling contractor were negligent because they neither provided him with a safe place to work nor gave him any warning of the danger. *Id.* at 105-06.

The Mississippi Supreme Court in *Buford* observed that the plaintiff and owner were equally aware of the conditions on top of the refrigeration unit. Therefore, the plaintiff's knowledge of the conditions absolved the owner of liability. 388 So. 2d at 149-50. Similarly, the court in *Fortenberry Drilling* ruled that the owners were not liable for the plaintiff's injury. The court's holding was twofold: (1) The dangers inherent in restacking the drill collars were obvious and known to the plaintiff, and (2) the plaintiff's employer assumed the duty of restacking the drill collars, and thus the owners owed him no duty of protection. 391 So. 2d at 106-07.

[3] "A licensee is one who enters upon the property of another for his own convenience, pleasure or benefit pursuant to the license or implied permission of the owner

decision in *Hoffman v. Planters Gin Co.*[6] *Hoffman* represented a limited adoption[7] of the majority rule abolishing distinctions among entrants injured as a result of some negligent action or inaction of the landowner.[8] Under the majority view, every entrant is owed the duty of ordinary and reasonable care;[9] the entrant's status is relevant only when injury results from the condition of the premises.[10] The holding in *Hoffman* adopted the majority view to the extent that invitees and licensees are owed a duty of reasonable care[11] in cases in which the

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. . . ." Hoffman v. Planters Gin Co., 358 So. 2d 1008, 1011 (Miss. 1978) (citing Kelley v. Sportmen's Speedway, Inc., 224 Miss. 632, 643, 80 So. 2d 785, 790 (1955)), *quoted in* Hughes v. Star Homes, Inc., 379 So. 2d 301, 303 (Miss. 1980). The RESTATEMENT (SECOND) OF TORTS § 330 (1965) defines a licensee as "a person who is privileged to enter or remain on land only by virtue of the possessor's consent." At common law the only duty owed a licensee was to refrain from "a willful or wanton wrong." Illinois Cent. R.R. v. Arnola, 78 Miss. 787, 788, 29 So. 768, 768 (1901). *But see* Hoffman v. Planters Gin Co., 358 So. 2d 1008, 1011-13 (Miss. 1978) (under certain circumstances licensee owed duty of reasonable care).

[4] "[A] trespasser is one who enters upon another's premises without license, invitation or other right." Hoffman v. Planters Gin Co., 358 So. 2d 1008, 1011 (Miss. 1978) (citing Kelley v. Sportsmen's Speedway, Inc., 224 Miss. 632, 643, 80 So. 2d 785, 790 (1955)), *quoted in* Hughes v. Star Homes, Inc., 379 So. 2d 301, 303 (Miss. 1980). The RESTATEMENT (SECOND) OF TORTS § 329 (1965) defines a trespasser as "a person who enters or remains upon land in the possession of another without a privilege to do so created by the possessor's consent or otherwise." The duty owed a trespasser is not to willfully or wantonly injure him. Ingram-Day Lumber Co. v. Harvey, 98 Miss. 11, 18-19, 53 So. 347, 348 (1910).

[5] *See* Roberts v. Mississippi Power & Light Co., 193 Miss. 627, 638, 10 So. 2d 542, 544 (1942) ("owner of land owes no duty to trespassers or licensees except to refrain from willful or wanton injury"); Ness Creameries v. Barthes, 170 Miss. 865, 872-73, 155 So. 222, 224 (1934) (landowner owed invitee-workers duty of reasonable care to prevent their injury from any defect in owner's property or equipment); *1978 Mississippi Supreme Court Review,* 50 MISS. L.J. 137, 137 & n.4 (1979) (citing General Tire & Rubber Co. v. Darnell, 221 So. 2d 104, 107 (Miss. 1969)) (invitee is owed duty of reasonable care to make premises safe for his entrance).

[6] 358 So. 2d 1008 (Miss. 1978).

[7] *See* text accompanying notes 11 through 14 *infra.*

[8] *See 1978 Mississippi Supreme Court Review, supra* note 5, at 137-38 (discussing majority view).

[9] *See, e.g.,* Cunag v. McCarthy, 42 Ill. App. 2d 36, 191 N.E.2d 404, 407 (1963) (duty of ordinary care applies where injuries of a licensee arise from host's active negligence, and host knew or should have known of licensee's presence); LeCompte v. Wardell, 134 Mont. 490, 333 P.2d 1028, 1030 (1959) (plaintiff injured by falling hoist entitled to recover where hoist fell because of defendant's negligence).

[10] *See, e.g.,* Bernard v. Florida E. Coast Ry., 624 F.2d 554, 554 n.1 (5th Cir. 1980) (entrant's status is crucial only where injury occurs as a result of a condition of the premises); Hix v. Billen, 284 So. 2d 209, 210 (Fla. 1973) (same).

[11] 358 So. 2d at 1013.

landowner is actively negligent,[12] involved in the operation or control of a business,[13] and aware of the entrant's presence.[14] Hindsight confirms that the circumscription in *Hoffman* represents the court's hesitancy to adopt new exceptions, or to extend existing exceptions,[15] to common law distinctions that protect the sovereignty of a landowner over his property.[16]

In 1980, the supreme court attempted to clarify the limits of *Hoffman*[17] in *Hughes v. Star Homes, Inc.*[18] The court held that the absence of active conduct[19] on the part of the landowner removed *Hughes* from the *Hoffman* exception.[20] Specifically noting the difference between active conduct and "conditions of the premises," or "passive negligence,"[21] the court refused to accede to the chorus of commentators calling for the total abolition of common law distinctions among entrants.[22] When harm occurs in the absence of a landowner's active negligence, the standard of care owed the injured entrant clearly will depend upon the entrant's status as an invitee, a licensee, or a trespasser.[23]

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[12] *Id.*

[13] *Id.*

[14] *Id.*

[15] *See, e.g.*, 44 Miss. L.J. 805, 811-12 (1973) (supreme court has refused to expand application of the attractive nuisance doctrine). In Jackson v. City of Biloxi, 272 So. 2d 654 (Miss. 1973), the court refused to adopt the liberalized attractive nuisance doctrine of the RESTATEMENT (SECOND) OF TORTS § 339 (1965). Rejecting the Restatement's balancing test, which weighs all the circumstances that bear on the foreseeability of harm to trespassing children, the court denied relief to a child injured by an obvious danger that was within the child's comprehension. 272 So. 2d at 658. As recently as 1980, the supreme court denied recovery in a wrongful death action for failure to meet the dangerous instrumentality element of Mississippi's attractive nuisance doctrine. Hughes v. Star Homes, Inc., 379 So. 2d 301, 305 (Miss. 1980).

[16] *See 1978 Mississippi Supreme Court Review, supra* note 5, at 143 (long tradition of landowner sovereignty makes abolition of common law distinctions too drastic); *cf.* Hughes v. Star Homes, Inc., 378 So. 2d 301, 304 (Miss. 1980) (discussing attractive nuisance doctrine; society must not place upon landowner unreasonable burden to provide absolutely safe premises).

[17] *See* text accompanying notes 11 through 14 *supra.*

[18] 379 So. 2d 301 (Miss. 1980). The plaintiffs in *Hughes* were the parents of a ten-year-old boy who died of injuries received while he was playing at a construction site. *Id.* at 302-03. The child had crawled into a newly installed septic tank. Attempting to climb out of the tank, he pulled a cement slab from its resting place adjacent to the rim of the structure. The falling slab fractured the youth's skull, and he died a few hours later. *Id.* at 303.

[19] *Id.* at 304.

[20] The characterization of the defendant's conduct as passive removed the case from the *Hoffman* exception; thus, the landowner's standard of care was not to willfully or wantonly injure the entrant. *Id.*

[21] Active negligence exists when the landowner knew or should have known of the injured person's presence, and the injury was caused by the landowner's affirmative negligence. *See, e.g.*, Hix v. Billen, 284 So. 2d 209, 210 (Fla. 1973) (active negligence in turning on automobile ignition contrary to instructions); Anderson v. Welty, 334 S.W.2d 132, 136-38 (Mo. App. 1960) (recklessly driving cattle in sale barn was active negligence);

In cases not within the scope of *Hoffman,* licensees and trespassers are owed the same standard of care—not to willfully or wantonly injure the entrant.[24] Yet, it is not at all clear whether *Hoffman*[25] cloaks the trespasser with the same right to due care heretofore bestowed on invitees and licensees.[26] The distinction, it would seem, is crucial. If, in a *Hoffman* framework,[27] the trespasser is treated as distinct from other entrants,[28] that is, if the duty of care owed the trespasser is not elevated to the level of reasonable care, then recovery inevitably hinges upon the potentially tenuous characterization of the entrant as either a trespasser or a licensee.[29] *Hughes* offers little guidance in this matter. The court found the plaintiff "was a trespasser, or at most a licensee."[30] It then cited *Hoffman* for the proposition that *licensees* are owed the duty of reasonable care in cases involving the active negli-

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LeCompte v. Wardell, 134 Mont. 490, 333 P.2d 1028, 1030 (1959) (active negligence in placing object across the shaft of a hoist causing hoist to fall on plaintiff). Passive negligence exists if injury is caused merely by the dangerous condition of the premises. *See, e.g.,* Foster v. Harding, 426 P.2d 355, 360 (Okla. 1967) (unlighted stairway is condition of the premises and, therefore, passive negligence).

[22] *See, e.g.,* Hughes, *Duties to Trespassers: A Comparative Survey and Reevaluation,* 68 YALE L.J. 633, 701-04 (1959) (arguing for general negligence approach); Comment, *Trespassers, Licensees and Invitees: Are the Distinctions Needed?,* 41 MISS. L.J. 562, 575-77 (1970) (advocating abolition of the trespasser, licensee, invitee distinctions); Comment, *The Outmoded Distinction Between Licensees and Invitees,* 22 MO. L. REV. 186, 186-87 (1957) (occupier's liability should depend upon magnitude of risk of harm, its foreseeability, and means available to avoid it); 25 VAND. L. REV. 623, 640 (1972) (consideration of human safety in urban society requires general negligence approach).

[23] For example, once the court determined that *Hughes* did not present *Hoffman* facts, it shifted its inquiry to whether the child might still recover despite his status as, at most, a licensee under the attractive nuisance doctrine. Hughes v. Star Homes, Inc., 379 So. 2d at 304-06.

[24] *Id.* at 304.

[25] *See* text accompanying notes 11 through 14 *supra.*

[26] *See* Hughes v. Star Homes, Inc., 379 So. 2d at 304; notes 2, 3 and accompanying text *supra.*

[27] *See* text accompanying notes 11 through 14 *supra.*

[28] Invitees and licensees are owed the duty of ordinary and reasonable care in cases that fulfill the requirements of *Hoffman,* 358 So. 2d at 1013.

[29] *See* Marlon Inv. Co. v. Conner, 246 Miss. 343, 349-50, 149 So. 2d 312, 314-15 (1963) (illustrating the difficulty in determining status of plaintiff as licensee).

[30] 379 So. 2d at 304.

gence of a landowner.[31] It would appear that trespassers remain distinct from other entrants in the *Hoffman* context.[32] Unfortunately, the absence of facts similar to those in *Hoffman*[33] eliminated the need in *Hughes* to define the status of trespassers under *Hoffman.*

B. Business Torts

1. False, Deceptive, or Misleading Advertising

Tort liability for intentional interference with prospective business relations is well established.[34] Generally, competition is an excused or privileged interference; when such activity is unfair, however, a tort action may lie in favor of the injured competitor.[35] Moreover, an action for unfair competition may be based on misleading advertising where such advertising lures away the injured competitor's customers.[36] Mississippi's statutory recognition of these principles provides for both a criminal penalty and a civil action where a false, misleading, or deceptive advertisement injures another's business.[37] This statute was con-

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[31] *Id.* (citing Hoffman v. Planters Gin Co., 358 So. 2d 1013 (Miss. 1978)).

[32] *See* text accompanying notes 11 through 14 *supra.*

[33] *Id.*

[34] *See, e.g.,* Ross v. Deposit Guar. Nat'l Bank, 400 F. Supp. 45, 52 (S.D. Miss. 1974) (corporate stockholders alleged tortious contract interference in suit against bank); Irby v. Citizens Nat'l Bank, 239 Miss. 64, 67, 121 So. 2d 118, 119 (1960) (defendants in action on promissory note counterclaimed against plaintiff bank for tortious interference with business relations); Bailey v. Richards, 236 Miss. 523, 536-38, 111 So. 2d 402, 407-08 (1959) (malicious interference by real estate broker with right to pursue lawful business constituted a tort); RESTATEMENT (SECOND) OF TORTS § 766B (1979) ("one who intentionally and improperly interferes with another's prospective contractual relation . . . is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation . . . "). *See generally* W. PROSSER, *supra* note 2, § 130, at 953-54 (most cases focus on defendant's motive for interfering); Walker, *Common Law Protection of Economic Expectancies: "Business Torts" in Mississippi,* 50 MISS. L.J. 335, 336 (1979) (discussion of Mississippi cases concerning interference with economic relations in three areas—where only economic injury is present, where only third party interference is involved, and where only Mississippi's nonstatutory law is considered).

[35] *See generally* W. PROSSER, *supra* note 2, § 130, at 956.

[36] *Id.* at 959-60.

[37] The statute provides:

> Any person who, with [an] intent to sell or . . . dispose of merchandise . . . [and] with [an] intent to increase the consumption of or demand for such merchandise . . . places before the public . . . an advertisement [which] contains any assertion, representation or statement of fact which is untrue, deceptive or misleading . . . and which such person knew, or might on reasonable investigation have ascertained to be untrue, deceptive or misleading, shall be punished by a fine . . . and the offending person, whether found guilty or not,

strued most recently during the 1980 term of the Mississippi Supreme Court.

In *Dixieland Food Stores, Inc. v. Kelly's Big Star, Inc.*,[38] the court was afforded an opportunity to decide an unfair competition suit brought under section 97-23-3 of the Mississippi Code. Big Star sued for damages arising from a supposedly untrue, misleading, and deceptive advertisement.[39] The advertisement in question contained a price comparison of certain items allegedly purchased by a notary public. In fact, the notary public only attested to the accuracy of the price comparison.[40] Rather than challenge the comparison, Big Star contended that the inaccurate statements concerning the use of the notary public amounted to unfair competition.[41]

Prior to *Dixieland Food Stores*, the supreme court considered unfair competition cases in which price cutting was used to attract a competitor's customers.[42] For example, in *Memphis Steam Laundry-Cleaners, Inc. v. Lindsey*,[43] the court found that the defendant reduced prices for the express purpose of injuring the plaintiff's dry cleaning business. When price cutting is so employed, the malicious purpose[44] behind the action converts the legal right to promote one's business

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> may be held civilly responsible in tort for damages to persons or property proximately resulting from a violation of this section.

MISS. CODE ANN. § 97-23-3 (1972). For a discussion of a creditor's liability for false advertising under the Lanham Act and certain state statutes, see R. CALLMAN, 1 UNFAIR COMPETITION, TRADEMARKS, AND MONOPOLIES § 18.1-.2 (3d ed. 1967 & Supp. 1980).

[38] 391 So. 2d 633 (Miss. 1980).

[39] *Id.* at 633. Big Star and Piggly Wiggly were the only grocery stores in Taylorsville. Big Star ran an advertisement stating "Why pay more!! Check our prices first!!" Piggly Wiggly purchased 172 items at both stores and published an advertisement comparing the prices. The advertisement showed that Piggly Wiggly was lower on 171 out of 172 items. A notary public had attested to the accuracy of the price comparison. In one inconspicuous corner of the advertisement, however, it stated that the notary public had purchased and compared the prices. The price comparison contained three errors totalling 20½ cents. *Id.* at 634-35.

[40] *Id.* at 634-35.

[41] *Id.*

[42] *See, e.g.*, Wagley v. Colonial Baking Co., 208 Miss. 815, 849-50, 45 So. 2d 717, 722 (1950) (bakery's price reduction was unlawful interference with plaintiff's business).

[43] 192 Miss. 224, 5 So. 2d 227 (1941). Lindsey owned and operated a dry cleaning business. After attempts were made to convince him to charge more for cleaning, competitors moved into the area and began to undercut Lindsey's prices. *Id.* at 231-32, 5 So. 2d at 228-29. *See generally* Walker, *supra* note 34, at 340-41 (discussion of *Memphis Steam Laundry-Cleaners*).

[44] Malice as a test of liability for unfair competition does not signify ill will toward a particular individual. Instead, it indicates a condition of mind manifesting an intentional wrongdoing without just cause or excuse. 192 Miss. at 237-38, 5 So. 2d at 231.

into a willful wrong. Thus, upon a finding of malice, a jury may properly hold a defendant liable for damages.[45] In a later case, *Quality Stamps Co. v. Page's Supermarkets,*[46] a grocery store charged a competitor with unfair competition through a trading stamp coupon exchange campaign. The defendant countered the plaintiff's coupon redemption program by offering to redeem the coupon at the defendant's store. Under these circumstances, the court found that the defendant's actions were justified to prevent a loss of customers.[47]

In *Dixieland Food Stores,*[48] the court carefully pointed out that the accuracy of the price list was not challenged.[49] Moreover, the plaintiff did not contend that it lost customers because of the allegedly misleading advertisement.[50] The court stated that it was not the intent of section 97-23-3 that every mere technical error or misstatement in an advertisement cause the individual to be liable for damages. Also, any damages sustained must have been proximately caused by the false, deceptive, or misleading advertising.[51] The court held not only that the plaintiff failed to show any causal connection between the inaccuracies in the advertisement and the damages alleged, but also that there was no evidence of a malicious intent to destroy the plaintiff's business.[52]

Without extended analysis, the court in *Dixieland Food Stores* reversed the jury verdict on the basis that the plaintiff totally failed to show a causal connection between the challenged advertisement and the damages incurred.[53] Section 97-23-3 indicates that traditional negligence standards are applicable to a civil action brought under that section.[54] Thus, where reasonable minds can differ as to a question of fact, the issue of liability should be for the jury.[55] Conversely, as noted by the court in *McGee v. Bolen,*[56] where there are no factual issues, the issue of negligence is properly a question for the court.[57] Past supreme court decisions indicate that jury verdicts must be based upon reasonable probabilities and not mere possibilities.[58] In *Dixieland Food Stores*, the court noted that there was neither proof that any of plaintiff's customers were misled by the inaccurate advertisement, nor a showing of a causal connection between the damage alleged and the defendant's conduct.[59] In sum, the court's emphasis upon the plaintiff's failure to show a causal relationship and its simultaneous failure to comment concerning the jury's decision strongly suggest that the decision in the trial court was without foundation. The obvious conclusion is that the court considered the evidence to be such that reasonable minds could not differ concerning the effect of the defendant's misleading advertisements on the plaintiff's customers.

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[45] Because the defendant had no legitimate reason to reduce prices and because his conduct was wanton and malicious, the peremptory instruction and submission to the jury were proper. *Id.* at 240, 5 So. 2d at 232.

[46] 246 Miss. 112, 149 So. 2d 348 (1963).

[47] *Id.* at 115-17, 149 So. 2d at 349-50. The court declined to consider whether under other circumstances the defendant's acts would have amounted to unfair business practices. *Id.* at 117, 149 So. 2d at 350.

[48] 391 So. 2d 633 (Miss. 1980).

[49] *Id.* at 636.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *See* note 37 *supra.*

[55] *See* MISS. CODE ANN. § 11-7-17 (1972) (negligence questions are for jury).

[56] 369 So. 2d 487 (Miss. 1979).

2. Boycotts

The common law recognized tort liability for interference with prospective commercial advantage where physical violence or threats of violence were used to prohibit potential customers from doing business with a merchant.[60] When this precedent has been cited in attempts to enjoin politically motivated boycotts, however, its preclusive effect has been circumscribed by the application of first amendment principles.[61] Nevertheless, even when the first amendment is utilized to justify organized interference with business relations, or boycotts, judicial characterization of the factual context in which that interference takes place determines the legality of the activity.[62] For example, the United States Supreme Court has upheld peaceful picketing by applying the first amendment;[63] however, the first amendment will not provide constitutional protection for violent picketing.[64] Therefore, under the Supreme Court's analysis, presence or absence of violence determines the viability of a cause of action for damages arising from an organized activity which *a fortiori* involves interference with business relationships. Even the first amendment cannot be used to justify unlawful coercion and violence.

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[57] *Id.* at 493. A peremptory instruction on liability in a wrongful death suit was assigned as error. The test governing the peremptory instruction in *McGee* was:

> The court is required to look only to the testimony given on behalf of the party against whom the peremptory instruction is requested, and taking that testimony or evidence as true together with all reasonable inferences which could be drawn from the evidence favorable to the prevailing party (against whom the peremptory instruction was requested) and can then decide if a verdict for the party would be sustained; if so, then, the trial court properly refused a peremptory instruction.

Id. See Haver v. Hinson, 385 So. 2d 605 (Miss. 1980). Rejecting an argument that Haver was entitled to a peremptory instruction, the court stated that a factual question was presented for the jury. The court also found that in viewing the evidence in the light most favorable to the verdict, reasonable minds could have found that due care was exercised. *Id.* at 607.

[58] Tombigbee Elec. Power Ass'n v. Gandy, 216 Miss. 444, 456, 62 So. 2d 567, 571 (1953) (discussing rule).

[59] 391 So. 2d at 636.

[60] *See* W. PROSSER, *supra* note 2, at 949.

[61] U.S. CONST. amend. I provides that "Congress shall make no law . . . abridging the freedom of speech."

In Mississippi, this limitation on boycott interference with business relations has, since 1949, been expressed in both legislative enactment[65] and supreme court opinions.[66] The initial statement concerning the legality of organized activity which interferes with business activity arose before the unified civil rights movement of the 1960s and, quite naturally, in the context of a labor dispute. Rather than addressing the propriety of a cause of action for damages accruing from interference with business relations, the supreme court's decision in *Southern Bus Lines, Inc. v. Amalgamated Association of Street, Electric Railway and Motor Coach Employees*[67] focused on whether the issuance of an injunction to prohibit mass picketing was appropriate.[68] The court observed in dicta that private citizens could not conspire illegally to destroy another person's business.[69] In addition, the court defined "illegally" in such a way that peaceful picketing was the only picketing sanctioned under the law; "mass picketing" was not, by definition, peaceful.[70]

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[62] *See* Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308, 313-15, 321 (1968) (peaceful picketing protected by first amendment).

[63] *See* Edwards v. South Carolina, 372 U.S. 229, 238 (1963) (first amendment permits use of streets and public places for exercise of right of free speech); New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 562-63 (1938) (blacks picketed white-owned stores).

[64] *See* Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 299 (1941) (freedom of speech not so absolute that states cannot deal with coercion resulting from extensive violence); Kelly v. Page, 335 F.2d 114, 119 (5th Cir. 1964) (right to picket not without limits).

[65] MISS. CODE ANN. § 97-23-83 (1972) provides:

> If any person shall in any manner threaten with bodily harm, intimidate or coerce another person to prevent said person from lawfully trading or carrying on business, including buying or selling, he shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by imprisonment for not more than one (1) year in the county jail or be fined not more than one thousand dollars ($1,000.00) or both.

[66] *E.g.*, Southern Christian Leadership Conf. v. A.G. Corp., 241 So. 2d 619, 624 (Miss. 1970) (secondary boycott deemed an illegal and unlawful conspiracy entered into for purpose of ruining merchant's business); Shields v. State, 203 So. 2d 78, 81 (Miss. 1967) (defendant's threats, which were intended to intimidate and coerce persons from trading at a store, violated § 97-23-83); Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, 205 Miss. 354, 374-80, 38 So. 2d 765, 768-71 (1949) (injunction against illegally conducted labor boycott permissible).

[67] 205 Miss. 354, 38 So. 2d 765 (1949).

Subsequent to *Southern Bus Lines,* and no doubt in response to the civil rights movement, the Mississippi Legislature enacted what became section 97-23-83 of the Mississippi Code.[71] This 1966 statute provides criminal sanctions for activity which previously had been attacked in civil actions for monetary or injunctive relief.[72]

This statute was interpreted during the 1967 term of the Mississippi Supreme Court in *Shields v. State,*[73] a case in which the court held that the essence of the offense was "threatening with the intent or purpose to intimidate."[74] In addition, the court noted that "[n]o precise words are needed to convey a threat because it may be done by innuendo or suggestion, and any language which conveys a threat with adequate clearness is sufficient."[75] The court continued by stating that "[a]ny words or act calculated and intended to cause an ordinarily prudent and firm person to fear an injury to his person or property are sufficient."[76] Thus, violation of the criminal statute was defined in common law tort language.

In 1970, the supreme court was given its initial opportunity to attempt to balance first amendment protection of political speech against boycott interference with business relationships. *Southern Christian Leadership Conference v. A.G. Corp.*[77] arose from organized civil rights activities and was a suit by a corporation for an injunction and for damages allegedly caused by a black boycott of the corporation's business.[78] The chancellor found that the defendants had illegally conspired to ruin A.G. Corporation's business and had used unlawful coercion, threats, and violence as a means to that end.[79] The supreme court, affirming the conclusions of the trial court, primarily relied upon the analysis used in *Southern Bus Lines* to condemn forceful or violent interference with business relationships.[80] In so doing, the court clearly stated that there could be no first amendment justification for such conduct where the participants held no particular grievance against the boycotted business and had made no complaint to that business prior to the commencement of the boycott.[81]

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[68] *Id.* at 374-76, 38 So. 2d at 768-69.

[69] *Id.* at 375-76, 38 So. 2d at 769.

[70] *Id.*, 38 So. 2d at 769.

[71] Act of February 9, 1966, ch. 384, 1966 Miss. Laws 712 (codified at MISS. CODE ANN. § 97-23-83 (1972)). For the text of § 97-23-83, see note 65 *supra.*

[72] *See, e.g.,* Southern Bus Lines, Inc. v. Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees, 205 Miss. 354, 372-73, 38 So. 2d 765, 767-68 (1949) (suit for injunctive relief).

[73] 203 So. 2d 78 (Miss. 1967).

[74] *Id.* at 81.

[75] *Id.*

[76] *Id.*

[77] 241 So. 2d 619 (Miss. 1970).

[78] *Id.* at 620.

During the 1980 term, in *NAACP v. Claiborne Hardware Co.*,[82] the supreme court once again considered the appropriate scope of the first amendment's circumscription of the right to prohibit boycott interference with potential commercial or business relations. In *Claiborne Hardware,* the supreme court upheld a finding that the challenged boycott was executed with force, violence, and threats.[83] The court held that because these factors were present, the boycott was illegal, and, moreover, an unlawful conspiracy existed since there was an agreement to use illegal force, violence, or threats.[84] The court, citing *Shields,* also observed that since intimidation, coercion, and threats were used, section 97-23-83 of the Mississippi Code was violated.[85] The court reversed and remanded on the issue of damages because the trial court failed to include factors affecting sales and to delineate the method used in calculating goodwill.[86] Nevertheless, the court did not address the question whether section 97-23-83 is constitutionally sound under the first amendment.

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[79] *Id.* at 624.

[80] *Id.*

[81] *Id.*

[82] 393 So. 2d 1290 (Miss. 1980).

[83] *Id.* at 1301.

[84] *Id.* Mississippi's conspiracy statute, MISS. CODE ANN. § 97-1-1 (1972) provides that a conspiracy exists if two or more persons conspire either:

> (a) To commit a crime; or
>
> . . . .
>
> (e) To prevent another from exercising a lawful trade or calling, or doing any other lawful act, by force, threats, intimidation, or by interfering or threatening to interfere with tools, implements, or property belonging to or used by another, or with the use or employment thereof; or
>
> (f) To commit any act injurious to the public health, to public morals, trade or commerce . . . .

See Southern Christian Leadership Conf. v. A.G. Corp., 241 So. 2d 619, 626 (Miss. 1970) (conspiracy requires illegal activity and an agreement); Mississippi Power & Light Co. v. Town of Coldwater, 234 Miss. 615, 636, 106 So. 2d 375, 381 (1958) (persons form conspiracy who seek to achieve unlawful purpose or a lawful one in an illegal manner).

[85] 393 So. 2d at 1302.

[86] *Id.* at 1304.

As the foregoing discussion reveals, the court's opinion leaves much to be desired from the standpoint of constitutional analysis. For example, if section 97-23-83 of the Mississippi Code is on its face vague and overbroad under the first[87] and fourteenth amendments,[88] it may be struck down.[89] If the statute is unconstitutional in any respect, it may not be constitutionally applied for any purpose.[90]

Even though the supreme court reversed as to damages, it did not explain whether damages caused by protected activity should be segregated from those caused by unprotected activity. The United States Supreme Court in *United Mine Workers v. Gibbs*[91] indicated that where the damages arising from violence and from a protected activity are separable, then recovery will be permitted only for damages caused by violence, and not for those caused by constitutionally protected picketing.[92]

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[87] See note 61 *supra* for the text of the first amendment.

[88] U.S. CONST. amend. XIV, § 1 provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

[89] In Gooding v. Wilson, 405 U.S. 518, 519 (1972), the Court struck down a Georgia statute which provided: "Any person who shall without provocation, use to or of another, and in his presence . . . opprobrious words or abusive language, tending to cause a breach of peace . . . shall be guilty of a misdemeanor." The Court held that the statute was so broad that it licensed the jury to set its own standards for each case. *Id.* at 528. Previously, in Coates v. City of Cincinnati, 402 U.S. 611 (1971), the Court struck down a statute which provided that if persons gathered on the street, they must conduct themselves so as not to annoy anyone. The Court stated that this ordinance was unconstitutionally vague because it subjected the exercise of the right to assembly to an unascertainable standard, and was unconstitutionally broad because it authorized the punishment of constitutionally protected conduct. *Id.* at 614.

Basic to an argument based upon overbreadth is the concept that the law should not be ruled facially invalid unless it deters protected activities. A statute which is narrowly drawn, however, cannot always be attacked successfully merely because it infringes upon a protected right. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-24 to -30 (1978) (discussion of overbreadth). In Cox v. Louisiana, 379 U.S. 559, 562 (1965), the Court upheld a statute which prohibited picketing around a courthouse. The Court stated that a state may adopt a narrowly drawn statute to protect an important function such as the administration of justice. *Id.* In Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978), the Court stated that a lawyer's conduct in seeking clients is entitled to some constitutional protection. A lawyer's solicitation of business, however, is subject to regulation in furtherance of an important state interest. *Id.* at 459.

The portion of MISS. CODE ANN. § 97-23-83 (1972) that may be overbroad is: "If any person shall in any manner . . . intimidate or coerce another person to prevent said person from lawfully trading or carrying on business . . . ."

[90] Coates v. City of Cincinnati, 402 U.S. 611, 619-20 (1971) (White, J., dissenting).

[91] 383 U.S. 715 (1966).

The *Claiborne Hardware* court's reason for not discussing the applicability of the first amendment and the segregation of damages is unclear. The court could have concluded that the boycott was entirely beyond the pale of first amendment protection. If that were the case, then no portion of the damages would have been attributable to the exercise of first amendment rights. Therefore, no segregation of damages would be required.

Lack of analysis of constitutional principles is, thus, the most glaring weakness of the *Claiborne Hardware* opinion. From the perspective of tort law, however, *Claiborne Hardware* signified the court's willingness to sustain a cause of action for injunction or damages arising from a conspiracy to destroy a business' relationships. The court's failure to provide a structural framework upon which its reasoning rests is a disservice to potential litigants, who are left knowing only that there is a standard for recovery for boycott interference with business relations, but having no clearly articulated constitutional underpinnings to sustain application of that standard.

II. Domestic Relations

During the 1980 term, the Mississippi Supreme Court rendered at least twenty-one decisions involving domestic relations.[93] Four of these decisions warrant textual discussion.

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[92] *Id.* at 732.

[93] Cases not treated textually are: Smith v. Weir, 387 So. 2d 761, 763 (Miss. 1980) (ceremonial marriage presumed valid unless divorce or annulment prior to husband's death is shown); Kuhne v. Miller, 387 So. 2d 729, 730 (Miss. 1980) (contestants estopped to contest will where devisee quitclaimed remainder in life estate to contestants and deed stated transfer pursuant to will); Butler v. Hinson, 386 So. 2d 716, 717-18 (Miss. 1980) (divorce decree providing for payment of lump sum alimony in installments cannot be modified to terminate alimony on wife's remarriage); Pearson v. Fortner, 386 So. 2d 205, 206 (Miss. 1980) (husband in contempt for nonpayment of child support cannot be granted custody because his hands are not clean); Garza v. Shoffner, 386 So. 2d 397, 399-400 (Miss. 1980) (Mississippi court can conduct full hearing to determine if material change in circumstances occurred which would allow modification of Louisiana custody decree); Stone v. Stone, 385 So. 2d 610, 614 (Miss. 1980) (where separation agreement made part of separate maintenance decree allowed husband to use farm rent free, wife could not sue for past due rent after divorce because property provisions were contractual and, therefore, unmodifiable); Thomas v. Purvis, 384 So. 2d 610, 612 (Miss. 1980) (principle that there must be a material change in circumstances adversely affecting child's welfare to modify decree applies only between parents, not between parent and grandparent); Fliter v. Fliter, 383 So. 2d 1084, 1088 (Miss. 1980) (upholding validity of

A. Divorce and Alimony

In 1980 the court clarified the extent to which a surviving spouse may be prevented contractually from inheriting from the decedent spouse. The court, however, left the law with regard to the modification of alimony in a state of confusion.

In *Roberts v. Roberts,*[94] the Mississippi Supreme Court interpreted a property settlement entered into between a husband and wife in conjunction with their petition for divorce.[95] As early as 1902, in *Wyatt v.*

1978 amendment to Mississippi's longarm statute extending in personam jurisdiction over nonresident defendant in child support action); Culver v. Culver, 383 So. 2d 817, 817-18 (Miss. 1980) (petition for divorce based on wife's refusal of sexual relations should be granted where wife's claim of husband's habitual drunkenness was insufficiently supported); McHann v. McHann, 383 So. 2d 823, 825-26 (Miss. 1980) (where alimony payments greater than required, lower court properly dismissed wife's petition for contempt; alimony due after husband's petition to modify decree not vested; alimony properly terminated due to wife's adulterous conduct); Walters v. Walters, 383 So. 2d 827, 828-29 (Miss. 1980) (lower court erred in refusing to find husband in contempt for failure to pay child support and in granting a stay provided he pay $25 per month on sum); Beacham v. Beacham, 383 So. 2d 146, 147 (Miss. 1980) (where husband paid alimony and child support although wife was at fault in divorce and children had reached majority, decree should be modified to terminate alimony payments where wife can support herself); McRae v. McRae, 381 So. 2d 1052, 1055-56 (Miss. 1980) (upholding termination of alimony payments because of former wife's meretricious relationship and cohabitation with another man after divorce); Callahan v. Callahan, 381 So. 2d 178, 179-80 (Miss. 1980) (error to dismiss bill seeking divorce because husband already married at time of marriage; although no basis existed for alimony since the marriage was void, joint property issues could be heard); Tagert v. Tagert, 381 So. 2d 597, 600 (Miss. 1980) (where husband and wife abandon rights under agreement executed prior to dissolution of marriage, divorce decree becomes res judicata as to all matters contained therein); Naveda v. Ahumada, 381 So. 2d 147, 149-50 (Miss. 1980) (grandparents without custody have no legal visitation rights); Wray v. Langston, 380 So. 2d 1262, 1263-64 (Miss. 1980) (consent decree ordering husband to transfer his homestead interest to wife properly upheld because decree was rendered based on parties' agreement and none of factors of Guthrie v. Guthrie, 226 Miss. 190, 84 So. 2d 158 (1955) were present; child support properly increased to include college expenses, attorney's fees award proper); Stauffer v. Stauffer, 379 So. 2d 922, 924 (Miss. 1980) (attorney's fees resulting from violation of divorce decree allowable).

[94] 381 So. 2d 1333 (Miss. 1980).

[95] The Roberts were married in 1975; they separated in 1978. A property settlement was executed, and a joint bill of divorce was filed one week later. Less than 48 hours later, before a divorce could be granted, Mr. Roberts died intestate. *Id.* at 1334. Following the issuance to Mrs. Roberts of letters of administration, the decedent's brothers and sisters petitioned the chancery court to adjudicate that they were Mr. Roberts' sole heirs at law. *Id.* at 1333-34. The basis of their contention was that the property settlement

Wyatt,[96] the court recognized the validity of a wife's right to release all claims to any part of her husband's estate, provided she received adequate consideration.[97] In *Kirby v. Kent,*[98] however, the court expressly refused to uphold property settlements entered into in contemplation of divorce.[99]

The question presented in *Roberts* was whether the property settlement at issue was contingent upon the granting of the divorce sought by the parties.[100] The agreement expressly provided in three places that its validity did not depend upon the procurement of a divorce.[101] Considering the agreement in its entirety,[102] the court con-

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constituted an absolute waiver of Mrs. Roberts' right to inherit the estate of her late husband. The lower court held that since the agreement was made in contemplation of divorce, it could not be enforced against the widow until the entry of a final decree. *Id.* at 1334.

[96] 81 Miss. 219, 32 So. 317 (1902).

[97] *Id.* at 228-29, 32 So. at 318. The Wyatts had agreed to separate, and Mrs. Wyatt released all of her "interest in and to the property owned" by Mr. Wyatt as consideration for two promissory notes. *Id.* at 227, 32 So. at 317. The court upheld the agreement and determined that Mrs. Wyatt was barred from inheriting from the estate of Mr. Wyatt. *Id.* at 228-29, 32 So. at 318.

[98] 172 Miss. 457, 160 So. 569 (1935).

[99] *Id.* at 466-67, 160 So. at 572.

[100] 381 So. 2d at 1334. The agreement at issue in Kirby v. Kent, 172 Miss. 457, 160 So. 569 (1935), specifically provided that the "parties being desirous of settling any and all claims for alimony that the said Mrs. Kent might have against the said Mr. S. J. Kent under the circumstances consider the sum of One Hundred and Ninety-five Dollars fair and adequate settlement of all alimony." *Id.* at 465-66, 160 So. at 571-72. The agreement provided further that the "settlement of alimony is hereby accepted as a full release and quittance of any and all liability present and future, in so far as any alimony or property adjustment . . . is concerned." *Id.* at 466, 160 So. at 572. Thus, the court concluded that the postnuptial agreement was contingent upon divorce. *Id.*, 160 So. at 572.

[101] 381 So. 2d at 1334-35. The preamble to the Roberts' agreement provided, "WHEREAS, irreconcilable difference [has] arisen between them, and they are now living separate and apart and *now desire to make a mutually acceptable settlement of their respective rights, liabilities, obligations and property rights arising out of and during the course of their marital relationship* . . . ." *Id.* at 1334 (emphasis added). The eighth paragraph stated: "This agreement shall be binding not only upon the Husband and Wife, but also upon their heirs, successors and assigns." *Id.* at 1335. In addition, paragraph twelve provided that the agreement was "not contingent upon either party procuring a divorce from the other." *Id.*

[102] The New York court, in *In re* Lee's Estate, 6 Misc. 2d 799, 161 N.Y.S.2d 962 (Sup. Ct. 1957), held that a provision that provided for the parties' release of all rights arising out of their marriage relationship was sufficient to bar a surviving spouse from inheritance. 161 N.Y.S.2d at 963-64. The Mississippi court expressed doubt that such language alone would be sufficient. 381 So. 2d at 1334. When the language contained in the preamble was considered together with the language of paragraphs eight and twelve, however, the court determined that the agreement as a whole constituted a bar to inheri-

cluded that the Roberts intended to settle their property "once and for all,"[103] and that the language of the agreement clearly evidenced that such a settlement was not contingent upon divorce.[104] Thus, Mrs. Roberts was precluded from inheriting her husband's estate.[105]

Although the court's decision in *Roberts* may appear inconsistent with *Kirby v. Kent*,[106] the two cases can be distinguished on a factual basis. *Roberts* involved a property settlement which expressly provided that it was not contingent upon divorce, while *Kirby* involved a postnuptial agreement entered into solely in contemplation of divorce.[107] Thus, *Kirby* allowed the Mississippi Supreme Court to uphold the agreement in *Roberts* and bar the right of inheritance.

The court rendered a confusing opinion in *McKee v. McKee*,[108] which involved a petition for modification of alimony.[109] The general rule is that periodic payment alimony is not a final judgment and is subject to modification upon a showing of substantial change in the parties' circumstances.[110] Lump sum alimony, on the other hand, is considered a final judgment and is not subject to modification.[111]

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tance. *Id.* at 1334-35.

[103] 381 So. 2d at 1335. The court noted that in interpreting a postnuptial agreement, only those rights expressly listed or reasonably inferred from the language of the agreement are barred. *Id.* (citing Clark v. Castner, 242 Mich. 609, 219 N.W. 675, 676-77 (1928)).

[104] 381 So. 2d at 1335. *See also* 47 MINN. L. REV. 872, 873-84 (1963) (discussing the enforceability of contracts entered into between spouses consenting to provision in wills).

[105] 381 So. 2d at 1335.

[106] 172 Miss. 457, 160 So. 569 (1935).

[107] *See* note 100 and accompanying text *supra.*

[108] 382 So. 2d 287 (Miss. 1980).

[109] The McKees were granted a divorce on February 25, 1972. The decree provided that Mr. McKee pay his wife $700 per month in alimony from March 1, 1972, until July 1, 1972. Thereafter, he was to pay her $500 per month until her death or remarriage. *Id.* at 288. On petition for modification of alimony, the lower court granted Mrs. McKee an additional $2000 annually. *Id.* at 289. For a discussion of the court's jurisdiction to modify decrees, see H. CLARK, DOMESTIC RELATIONS § 14.9, at 452-56 (1968).

[110] *See, e.g.,* Colton v. Colton, 252 Ala. 442, 41 So. 2d 398, 398-99 (1949) (if decree of alimony is not lump sum, it is subject to modification upon showing of change in circumstances); Simon v. Simon, 155 So. 2d 849, 849 (Fla. Dist. Ct. App. 1963) (same); Taylor v. Taylor, 348 So. 2d 1341, 1343 (Miss. 1977) (same). For a discussion of cases in other jurisdictions which follow this general rule, see Annot., 18 A.L.R.2d 10, 17-91 (1951). *But see* 3 U. BALT. L. REV. 328, 328-34 (1974) (modification of permanent alimony absent showing of change in circumstances of both parties).

[111] *See, e.g.,* Hopkins v. Hopkins, 379 So. 2d 315, 315 (Miss. 1980) (lump sum alimony final after term in which decreed and thus not subject to modification); Guess v. Smith, 100 Miss. 457, 461, 56 So. 166, 167 (1911) (same). For a general discussion of alimony in Mississippi, see J. BUNKLEY & W. MORSE, AMIS ON DIVORCE AND SEPARATION

The decree in *McKee* provided that the husband pay monthly alimony to his wife until her death or remarriage. The court interpreted this decree to reflect the parties' intent to "settle once and for all" any questions concerning alimony.[112] Accordingly, the court refused to modify the decree.[113]

The court recognized that periodic payment alimony is generally subject to modification when there is a clear and substantial change in circumstances.[114] After concluding that such a change was lacking in the instant case,[115] the court held that it was the "clear intention" of the parties to settle all monetary questions in the decree, and thus denied the petition for modification.[116] Thus, the court's opinion seems to indicate that the intent of the parties at the time of the decree is determinative of the possibility for modification.

Since the court noted that no substantial change in circumstances had occurred, the question arises whether the court has actually departed from the general rule concerning modification of alimony payments. If the court intended to create what amounts to a new type of alimony,[117] the discussion concerning the general rule seems unnecessary. Similarly, if the court resolved the issue by relying on traditional rules with regard to modification, the discussion emphasizing the intent of the parties was not determinative of the issue of modification. These apparent conflicts will not be resolved until a situation is presented in which substantial changes in circumstances have occurred and the parties intended the divorce decree to settle all property rights. Only then will the confusion surrounding the court's decision in *McKee* be alleviated.

B. *Child Support and Visitation*

Two significant advances were made during 1980 in the area of child support and visitation. First, the court extended visitation rights to unwed fathers of illegitimate children. Second, the court placed a

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IN MISSISSIPPI § 6.11, at 193 (1957).

[112] 382 So. 2d at 288.

[113] *Id.* at 289.

[114] *Id.* at 288.

[115] The court noted that at the time the final decree was entered, Mrs. McKee was earning about $5,100 annually and at the time of the petition she was earning $15,292 annually. Similarly, Mr. McKee's annual income had increased from $31,549 at the time of the divorce to $75,817 at the time of petition for modification. *Id.* at 288-89.

[116] *Id.* at 289.

[117] The court's reliance on the parties' intent at the time of the decree appears to create non-modifiable periodic payment alimony.

limitation on the requirement of divorced fathers to provide a college education for children in the custody of their mothers.

In *Pearson v. Clark,*[118] the Mississippi Supreme Court granted visitation rights to the father of an illegitimate child. Karen Pearson and Phillip Clark began cohabiting when they were fifteen years old, indicating to the community that they were legally married.[119] They made several attempts to obtain a marriage license; the license was denied because of their ages.[120] This relationship continued for more than three years before the couple separated.[121]

At the time of the separation, Karen was six weeks pregnant;[122] Phillip requested that she inform him when the child was born. The child, a son, was born on December 18, 1977. Upon learning of the birth of the child and Karen's failure to inform him, Phillip made several unsuccessful attempts to see the child.[123]

Several months later, Karen filed a Petition for Adjudication of Paternity,[124] asking that Phillip be adjudged the father of the child[125] and that he be ordered to pay the expenses of birth, child support,[126] and Karen's attorney's fees.[127] Phillip readily agreed.[128] An Order of Filiation[129] was entered adjudging Phillip the father of the child, order-

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[118] 382 So. 2d 482 (Miss. 1980).

[119] *Id.* at 482-83. Karen and Phillip lived in a mobile home parked on the homestead property belonging to Karen's parents. *Id.*

[120] *Id.* at 483. The couple traveled to Marks, Greenwood, and Clarksdale, Mississippi, in their attempts to obtain a marriage license. *Id.*

Minimum age requirements for obtaining marriage licenses are set forth in MISS. CODE ANN. § 93-1-5 (1972), which provides that "[t]he clerk shall not issue a marriage license under the provisions of this section unless the male applicant is at least seventeen (17) years of age, and the female is at least fifteen (15) years of age."

[121] 382 So. 2d at 483. No reason was given in the opinion for the separation.

[122] *Id.* Neither party disputed that the child had been fathered by Phillip. *Id.*

[123] *Id.* Phillip initially traveled to the hospital in Clarksdale, Mississippi, where the child was born, in an effort to see the child; however, Karen and the child had already been discharged. Phillip's mother also made unsuccessful attempts to see the child. *Id.*

[124] *Id.* The Uniform Law on Paternity has been adopted and incorporated into the laws of Mississippi. MISS. CODE ANN. §§ 93-9-1 to -49 (1972). The statutory basis for petititons for adjudicating paternity is set forth in *Id.* § 93-9-9 (1972), which provides:

> Paternity may be determined upon the petition of the mother, the child, or any public authority chargeable by law with the support of the child. If paternity has been lawfully determined, or has been acknowledged in writing according to the laws of this state, the liabilities of the father may be enforced in the same or other proceedings by the mother, the child, or any public authority which has furnished or may furnish the reasonable expenses of pregnancy, confinement, education, necessary support and maintenance, and medical or funeral expenses for the mother or the child. However, proceedings hereunder shall not be instituted by the mother after the child has reached the age of one year, unless the defendant be absent from the state so that personal service of process cannot be had upon him, or, unless the defendant has acknowledged in writing that he is the father of the child.

[125] 382 So. 2d at 483. Included in the petition was Karen's oath that Phillip was the

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father of her child. *Id.*

[126] *Id.* The statute authorizing recovery of expenses of birth and child support is Miss. Code Ann. § 93-9-7 (1972), which provides:

> The father of a child which is or may be born out of lawful matrimony is liable to the same extent as the father of a child born of lawful matrimony, whether or not the child is born alive, for the reasonable expense of the mother's pregnancy and confinement, and for the education, necessary support and maintenance, and medical and funeral expenses of the child. A child born out of lawful matrimony includes a child born to a married woman by a man other than her lawful husband.

[127] 382 So. 2d at 483. Reasonable attorney's fees may be recovered by a successful petitioner pursuant to Miss. Code Ann. § 93-9-45 (1972) which states:

> If the court makes an order of filiation, declaring paternity and for the support and maintenance, and education of the child, court costs, including the cost of the legal services of the attorney representing the petitioner, expert witness fees, the court clerk, sheriff and other costs shall be taxed against the defendant.

[128] Phillip admitted all averments made in Karen's petition. 382 So. 2d at 483.

[129] *Id.* Mississippi's law regarding orders entered in paternity hearings is set forth in Miss. Code Ann. § 93-9-29 (1972), which provides:

> (1) If the finding be against the defendant, the court shall make an order of filiation, declaring paternity and for the support and education of the child.
>
> (2) The order of filiation shall specify the sum to be paid weekly or otherwise, until the child reaches the age of sixteen (16). In addition to providing for the support and education, the order shall also provide for the funeral expenses if the child has died; for the support of the child prior to the making of the order of filiation; and such other expenses as the court may deem proper.
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> . . . .
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> (5) The court, on the date of the entering of such order of paternity, if the father of the child is unmarried and could lawfully have consummated a marriage with the mother of the child under the laws of this state, may adjudicate in such order that the child shall inherit from the father as could a natural child of the father under the statutes of descent and distribution; provided, however, that the entry of such order shall not abridge the right of the father to devise and bequeath his estate by last will and testament, as now provided by law, nor shall the mother or her heirs inherit any part of the estate of the father through said child, unless the mother and father of the child shall subsequently effect a valid marriage to each other. In the event of the death of such child, unmarried and without issue, the remaining estate, if any, in such child inherited from the father shall be vested in the legal heirs of the father.

The portion of the statute providing that support payments by the father of an illegitimate child end when the child has reached age sixteen (16) has been held unconstitutional by the Mississippi Supreme Court because it violates the equal protection clause of the fourteenth amendment. Rias v. Henderson, 342 So. 2d 737, 740 (Miss. 1977). There is no such age limitation for legitimate children. Miss. Code Ann. § 93-11-

ing the payments requested,[130] and stating that the child could inherit from Phillip as his natural child.[131]

Following this order, Phillip petitioned for visitation rights.[132] A hearing on this issue resulted in the award, to Phillip, of visitation rights to be carried out at certain specified times and places.[133]

On appeal,[134] the Mississippi Supreme Court held that the chancellor committed no error in granting visitation rights to Phillip, in view of "the interest, support and concern" that Phillip had displayed for the child.[135] Furthermore, the court concluded that the best interest and welfare of the child would be served by allowing these visits.[136] In support of its decision, the court relied on recent statements by the United States Supreme Court disapproving discrimination against fathers of illegitimate children, particularly where the fathers show notable concern for the child.[137] In addition, the Mississippi court found support in similar decisions from other jurisdictions.[138]

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65 (1972). For a discussion of the *Rias* decision, see *1977 Mississippi Supreme Court Review,* 49 MISS. L.J. 301, 452-55 (1978).

[130] 382 So. 2d at 483. Phillip was ordered to pay expenses of birth in the amount of $681, attorney's fees in the amount of $150, and child support in the amount of $100 per month. *Id.*

[131] 382 So. 2d at 483; *see* MISS. CODE ANN. § 93-9-29(5) (1972) (court may order that illegitimate child inherit from father in paternity suit). *But cf. id.* § 91-1-15 (1972) (unless father acknowledges child and marries mother, illegitimate child cannot participate in intestate succession of father's estate).

[132] 382 So. 2d at 483.

[133] *Id.* Phillip's visits were to take place on alternate weekends from 1:00 p.m. on Saturdays until 6:00 p.m. on Sundays at his parents' home. In addition, Phillip was awarded visitation rights for five days of his regular vacation and from 2:00 p.m. each December 25th until 6:00 p.m. each December 26th. Additional attorney's fees of $200 were awarded to Karen following the visitation award. *Id.*

[134] Karen appealed Phillip's award. *Id.* at 482.

[135] *Id.* at 483.

[136] *Id.* The court stressed the need of the child to receive the "continued love, support and concern of *both* parents." *Id.* (emphasis added).

[137] *See* Caban v. Mohammed, 441 U.S. 380, 394 (1979) (New York statute permitting mothers of illegitimate children to prevent an adoption by withholding consent but not allowing the same right to unwed fathers violates equal protection clause); Stanley v. Illinois, 405 U.S. 645, 657-59 (1972) (father who is ruled fit to be a parent is entitled to adopt his illegitimate children after their mother's death).

[138] *E.g.,* Mixon v. Mize, 198 So. 2d 373, 375 (Fla. Dist. Ct. App. 1967) (where not detrimental to child's welfare, visitation rights should be granted to putative father who exhibits true concern, provides support, and acknowledges child); Taylor v. Taylor, 295 So. 2d 494, 496 (La. Ct. App. 1974) (visitation hearing should be held to determine best interests of illegitimate children where mother stated defendant was father and he supported and cared for children); *In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186, 188 (Sup. Ct. 1958) (child's welfare is first concern in determining father's visitation rights).

The overriding considerations in any determination of child custody or visitation rights are the best interest and welfare of the child.[139] Although at common law an illegitimate child was considered to be the child of no one,[140] the prevailing rule in the United States is that, absent a statute to the contrary and providing she is fit, the mother of an illegitimate child has a superior legal right to the custody, care, and control of her child.[141] The putative father is generally held to have a right to the custody, care, and control of the illegitimate child secondary only to that of the mother.[142] When the father has been awarded this right pursuant to statute, he usually has begun to support the child; thus, the award may have been based on this support.[143]

The majority of courts, in determining whether a putative father should be granted visitation rights with his illegitimate child, have allowed the visits.[144] In nearly every case, the controlling considerations have been the best interest and welfare of the child.[145] Guided by this principle, the courts have looked to several factors in making their determinations. Many courts require that before a putative father's request for visitation rights will be considered, he must have legitimized or acknowledged the child.[146] Most courts require that support payments be made by the putative father before his request will be considered,[147] or that the visitation rights granted be conditioned upon continued payment.[148] Yet another factor in any such determination is a manifestation of love and concern by the putative father for the illegitimate child.[149] In addition, courts will consider other factors, including the existence of a relationship similar to marriage between the parents[150] and the child's need for male guidance and companionship.[151]

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[139] *See, e.g., Ex parte* Gille, 65 Cal. App. 617, 224 P. 784, 785 (1924) (child's best interests and welfare primary considerations in determining custody); Taylor v. Taylor, 295 So. 2d 494, 496 (La. Ct. App. 1974) (child's best interests and welfare govern visitation rights); Commonwealth v. Rozanski, 206 Pa. Super. Ct. 397, 213 A.2d 155, 156 (1965) (child's best interests governs custody decisions for legitimate and illegitimate children); 17 J. FAM. L. 174, 174 n.110 (1978-1979) (discussing rule).

[140] *See, e.g.,* Brewer v. Blougher, 39 U.S. (14 Pet.) 178, 198 (1840) (illegitimate child is *filius nullius* under principles of common law); State v. Tieman, 32 Wash. 294, 73 P. 375, 376 (1903) (same); *Re* M. [1955] 2 All E.R. 911, 912 (C.A.) (illegitimate is child of no one except mother).

[141] *See, e.g.,* Fowler v. Bright, 4 F. Supp. 565, 566 (W.D. Wash. 1933) (mother has right to custody unless so unfit that child's interests require giving custody to another); Jones v. Smith, 278 So. 2d 339, 343 (Fla. Dist. Ct. App. 1973) (illegitimate child's mother, unless unfit, has superior right to custody over father), *cert. denied,* 415 U.S. 958 (1974); *In re* Connolly, 43 Ohio App. 2d 38, 332 N.E.2d 376, 377 (1974) (same). *See generally* Annot., 98 A.L.R.2d 417, 427-31 (1964) (mother's superior custody right recognized by all jurisdictions). *But see In re* Mark T., 8 Mich. App. 122, 154 N.W.2d 27, 35 (1965) (court may grant custody to father rather than mother if in illegitimate child's best interests).

[142] *See, e.g., In re* Guardianship of Smith, 42 Cal. 2d 91, 265 P.2d 888, 889 (1954) (father has custody right superior to all but mother); Aycock v. Hampton, 84 Miss. 204, 205, 36 So. 245, 245 (1904) (if mother is dead, putative father who is able to support and care for illegitimate child has superior custody right); Wade v. State, 39 Wash. 2d 744, 238 P.2d 914, 916 (1951) (father's custody right inferior to mother's, but superior to others').

[143] *See Ex parte* Wallace, 26 N.M. 181, 190 P. 1020, 1024 (1920) (custody rights based on statutorily imposed duty).

At common law, a putative father had no duty to support his illegitimate child. *E.g.,* Lewis v. Crowell, 210 Ala. 199, 97 So. 691, 692 (1923) (no duty to support); Hurst v. Wagner, 181 Wash. 498, 43 P.2d 964, 965 (1935) (same). Most jurisdictions now impose a duty of support by statute. *E.g.,* S.D. CODIFIED LAWS ANN. § 25-8-1 (1976) (general duty); WIS. STAT. ANN. § 52.37 (West Supp. 1979) (monthly payments).

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[144] *See, e.g.,* Phillips v. Horlander, 535 S.W.2d 72, 74 (Ky. 1975) (biological father contributing to support of illegitimate child granted visitation rights); Locke v. Ladd, 119 N.H. 136, 399 A.2d 962, 964-65 (1979) (father initiating legitimation procedure granted visitation rights). *See generally* Annot., 15 A.L.R.3d 887 (1967) (visitation rights of putative father).

[145] *See, e.g., In re* One Minor Child, 295 A.2d 727, 728 (Del. 1972) (putative father may be awarded custody or visitation rights if in best interests of child); People *ex rel.* Francois v. Ivanova, 14 A.D.2d 317, 221 N.Y.S.2d 75, 76 (1961) (per curiam) (best interests of child is guiding principle used to determine custody and visitation rights); *Ex parte* Hendrix, 186 Okla. 712, 100 P.2d 444, 445 (1940) (best interests and welfare of child are of paramount importance in determining visitation rights).

[146] *See, e.g.,* Ford v. Loeffler, 363 So. 2d 23, 24 (Fla. Dist. Ct. App. 1978) (putative father cannot sue for visitation rights until after judicial determination that he is natural father); Vallera v. Rivera, 39 Ill. App. 3d 775, 351 N.E.2d 391, 394 (1976) (visitation rights allowed only if putative father acknowledges paternity); *cf.* Collins v. Division of Foster Care, 377 So. 2d 1266, 1271 (La. Ct. App. 1979) (father who refuses to legitimize illegitimate child has no parental rights under voluntary surrender and abandonment statute). *But cf.* Gardner v. Rothman, 370 Mass. 79, 345 N.E.2d 370, 372 (1976) (acknowledgement or its adjudication not required where paternity is conceded).

[147] *See, e.g.,* Mixon v. Mize, 198 So. 2d 373, 375 (Fla. Dist. Ct. App. 1967) (where putative father recognizes, shows interest in, and supports illegitimate child, visitation rights proper); R. v. F., 113 N.J. Super. 396, 273 A.2d 808, 814-16 (Jur. & Dom. Rel. Ct. 1971) (once putative father is found to be father and duty to support attaches, visitation rights allowed). *But see* Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195, 197 (1957) (visitation rights should not depend upon actual support unless father refuses to pay when requested); Commonwealth *ex rel.* Peterson v. Hayes, 252 Pa. Super. Ct. 487, 381 A.2d 1311, 1315 (1977) (visitation rights may be granted to putative father despite his lack of support and his hostility toward mother and her husband who desired to adopt child).

[148] *See, e.g.,* Vallera v. Rivera, 39 Ill. App. 3d 775, 351 N.E.2d 391, 394 (1976) (visitation rights conditioned on father's contributing to support); *In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186, 188 (Sup. Ct. 1958) (same).

[149] *See, e.g., In re* G., 61 A.D.2d 521, 403 N.Y.S.2d 57, 59-61 (1978) (adoption by mother and new husband denied where father maintained consistent loving relationship with illegitimate child, mother could not provide stable home, and adoption would prevent future visitation by father); Pierce v. Yerkovich, 80 Misc. 2d 613, 363 N.Y.S.2d 403, 414 (Fam. Ct. 1971) (putative father's love and affection for illegitimate child considered

Once the award of visitation rights to the putative father has been deemed proper, many courts require that the decree state explicitly the times, dates, and places for the visits.[152] This stipulation is intended to avoid disruption of the child's life, particularly when the mother or putative father has remarried or where ill feelings exist between the mother and father.[153]

In a few instances, courts have denied visitation rights to the putative father.[154] A Pennsylvania court denied such rights to a putative father even though he had in good faith entered into marriage with the child's mother.[155] The marriage was in fact bigamous and its annulment rendered the child illegitimate.[156] The court held that the best interest of the child would be served by denying the visits since the mother was young, attractive, and would probably remarry, and the future husband might adopt the child.[157] An Ohio court, using similar reasoning, denied visitation rights to a putative father who had a wife

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in awarding visitation rights).

In *Pierce,* the court granted visitation rights to the putative father despite a statutory provision stating that the putative father had no parental rights. The court stated that the statute was limited to situations where the father refused to acknowledge his paternity. 363 N.Y.S.2d at 404-05.

[150] *See In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186, 187-88 (Sup. Ct. 1958) (father had lived with mother and children as family unit).

[151] *See* Commonwealth v. Rozanski, 206 Pa. Super. Ct. 397, 213 A.2d 155, 158 (1965) (putative father only person available to give crucial male guidance).

[152] *See, e.g.,* Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195, 198 (1957) (decree set up reasonable and regular intervals); *In re* Anonymous, 12 Misc. 2d 211, 172 N.Y.S.2d 186, 189 (Sup. Ct. 1958) (times and places of visits specified).

[153] *See* Bagwell v. Powell, 267 Ala. 19, 99 So. 2d 195, 198 (1957) (specifying times and dates in decree prevents putative father's disruption of mother's, husband's, and child's lives).

[154] *See, e.g.,* Ford v. Loeffler, 363 So. 2d 23, 24 (Fla. Dist. Ct. App. 1978) (mother denied paternity of putative father, preventing establishment of paternity and granting of visitation rights); *In re* Connolly, 43 Ohio App. 2d 38, 332 N.E.2d 376, 379 (1974) (putative father had married and mother's husband had assumed parental role; no visitation rights warranted).

[155] Commonwealth v. Spano, 68 Pa. D.&C. 248, 248-50 (1949).

[156] *Id.* at 248-49. The putative father believed his first wife and their children had been killed in an air raid in 1944. Several years later, after he had remarried and his second wife had given birth to a son, he was notified his first wife and children were still alive. *Id.* at 248.

[157] *Id.* at 250. *Contra,* Commonwealth v. Rozanski, 206 Pa. Super. Ct. 397, 213 A.2d 155, 158-59 (1965) (that mother may marry in future is conjectural and child's needs are immediate; thus, no denial of visitation rights).

and other children, where the mother's new husband had assumed paternal duties toward the illegitimate child.[158]

In the instant case, the Mississippi Supreme Court has adopted the majority rule regarding visitation rights of putative fathers.[159] Surely justice and equity dictate such a holding, particularly where the putative father has demonstrated concern for his illegitimate child.[160] Although allowing such visits may cause some discomfort for the adults involved, the law, after all, is concerned with the child's best interest and welfare.[161] Thus, as one judge stated,"to the illegitimate child, the father is never putative," and his visits can offer the child a sense of stability and worth.[162] Therefore, a putative father's visitation rights should not be denied.

In 1960, in *Pass v. Pass,*[163] the Mississippi Supreme Court first held that the divorced father of a child in its mother's custody could be required to provide financially for the child's college education, so long as the child was worthy of and qualified for the college education.[164] Although this remains the general rule in Mississippi, the court, in *Hambrick v. Prestwood,*[165] somewhat limited the *Pass* rule.

Hambrick involved a decree for modification of child support[166] which ordered Hambrick, *inter alia,*[167] to pay the college expenses for his nineteen year old daughter, Cynthia.[168] Hambrick and Judith Prestwood, Cynthia's mother, were divorced in 1966; custody of Cynthia and her brother was awarded to Mrs. Prestwood.[169] Hambrick was ordered to pay child support[170] and was given visitation rights. Hambrick, however, had been unable to visit his children since 1974 because they refused to see him.[171] In addition, Cynthia expressed a strong dislike for her father which bordered on hatred.[172] She informed the lower court that no satisfactory arrangement could be made for visiting her father.[173] The court found no justification for Cynthia's position.[174]

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[158] *In re* Connolly, 43 Ohio App. 2d 38, 332 N.E.2d 376, 379-80 (1974).

[159] *See* note 142 and accompanying text *supra.*

[160] *See* notes 146 through 150 and accompanying text *supra.*

[161] *See* note 146 and accompanying text *supra.*

[162] Commonwealth v. Rozanski, 206 Pa. Super. Ct. 397, 213 A.2d 155, 157 (1965).

[163] 238 Miss. 449, 118 So. 2d 769 (1960).

[164] *Id.* at 458, 118 So. 2d at 773. The precise wording in *Pass* was:

> [W]e hold that where the minor child is worthy of and qualified for a college education and shows an aptitude therefor it is the primary duty of the father, if in reason financially able to do so, to provide funds for the college education of his minor child in the custody of the mother, where the mother and father are divorced and living apart.

Id., 118 So. 2d at 773.

[165] 382 So. 2d 474 (Miss. 1980).

[166] *Id.* at 475. The decree was rendered by the Chancery Court of the First Judicial District of Hinds County, Mississippi, in response both to Mrs. Prestwood's petition for modification and for reimbursement for medical expenses and to her petition requesting that Hambrick be cited for contempt. Hambrick had filed a cross-petition to modify in which he requested that the court terminate his child support, or condition its payment upon the children's sharing their love, society, affection, companionship, and services with him. *Id.* at 475-76.

[167] Hambrick was also ordered to pay $2,696 to reimburse Mrs. Prestwood for medical expenses of the children, to continue child support payments of $175 per month, to pay $10,887.36 for child support payments in arrears since 1974, and $1,250 attorney's fees. *Id.* at 475. The supreme court upheld all modifications except the monthly child

Upon reviewing these facts, the supreme court reversed the portion of the decree ordering Hambrick to pay for Cynthia's college education.[175] In so doing, the court reiterated its adherence to the *Pass* rule,[176] but held that Hambrick's duty to provide for Cynthia's college education was not absolute under these facts.[177] Instead, a child must be qualified for and worthy of a college education for the duty to arise.[178] The court thus held that for a child to be *worthy* of support from his father for a college education, that child must *earn* the sup-

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support payments, which were reduced by the amount of Cynthia's share. *Id.* at 478.

[168] *Id.* at 475. This payment was to include tuition, matriculation fees and other charges. It was to continue until Cynthia's graduation so long as she received average grades, unless she first reached 21 years of age, married, or became emancipated. *Id.*

[169] *Id.*

[170] *Id.* Child support was originally set at $135 per month but was raised to $175 per month in 1970. *Id.*

[171] *Id.* at 476. The court noted that Hambrick had made 29 attempts to visit his children in the year preceding his last attempted visit. Although Cynthia refused all of these attempts, Hambrick's son had visited his father five times. *Id.* Cynthia admitted that she had had no contact with Hambrick since 1973 or 1974. *Id.* at 477.

[172] *Id.* at 477. Cynthia also listed Mr. Prestwood, rather than Hambrick, as her father on her application to Hinds Junior College. *Id.*

[173] *Id.* The court concluded that Mrs. Prestwood had helped foster the children's feelings of ill will toward their father. *Id.* at 476-77. Previously, she had received a contempt citation for refusing to require her daughter to see Hambrick. This citation was reversed, but only because the evidence was insufficient to prove her actions beyond a reasonable doubt. *Id.* at 476.

[174] *Id.* at 477.

[175] *Id.* at 477-78. As a consequence of this reversal, the amount of the monthly child support payment was reduced by one-half. *Id.* at 478.

[176] *Id.* at 478.

[177] *Id.* at 477. The rule was stated in general terms. *Id.*

[178] *Id.* The court stated that this duty depends not only upon the child's academic ability, but also upon "whether the child's behavior toward, and relationship with the father, makes the child worthy of the additional effort and financial burden that will be placed on him." *Id.*

port by exhibiting "respect for [his] parents, love, affection and appreciation of parental efforts."[179] Since Cynthia had exhibited none of these conditions,[180] the court concluded that her father should not have to support her any longer, nor be required to pay her college expenses.[181] The court deemed this an exceptional situation which dictated a different treatment from that ordinarily required by the *Pass* rule. Consequently, the court employed a balancing test between the rights and obligations of Hambrick and those of Cynthia.[182]

The significance of the *Hambrick* decision is the court's emphasis on the relationship between a father and his child and its effect on the father's duty to provide his child with a college education. After *Hambrick,* the quality of the father-child relationship will apparently determine whether a child is worthy of a college education and its attendant financial burden. In addition to the father's financial situation and the child's qualifications for college, the child's worthiness of having his father provide for a college education represents a separate but equally significant consideration in ascertaining the existence of a duty that the father support his child.

III. TRUSTS

In *Johnson v. First National Bank,*[183] the court considered whether an irrevocable trust can be revoked and terminated by the settlor who is the sole beneficiary of the trust. The question was one of first impression in Mississippi,[184] and the court adopted the general rule that such a trust may be terminated.[185]

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[179] *Id.* The court noted that a college education is expensive and may require sacrifices by the parent. *Id.*

[180] *Id.*

[181] *Id.* The court took into consideration the fact that Cynthia had been employed and earned $460 per month, thus demonstrating her ability to finance her own education. *Id.*

[182] *Id.* at 478.

[183] 386 So. 2d 1112 (Miss. 1980).

[184] *Id.* at 1114. *Cf.* Yeates v. Box, 198 Miss. 602, 612, 22 So. 2d 411, 415 (1945) (testamentary trust will terminate or may be terminated on petition to a proper court when its purpose is fulfilled or there is no reason for its further existence); Anderson v. Love, 169 Miss. 219, 239, 153 So. 369, 370 (1934) (where power to revoke trust is not expressly reserved, settlor is without that power).

[185] 386 So. 2d at 1114. The court cited as authority the RESTATEMENT (SECOND) OF TRUSTS § 339 (1959), which states that "if the settlor is the sole beneficiary of a trust and is not under an incapacity, he can compel the termination of the trust, although the purposes of the trust have not been accomplished." *Id.* The court also relied upon G. BOGERT, LAW OF TRUSTS AND TRUSTEES § 1004 (2d ed. 1962), which states:

The settlor in *Johnson* entered into a trust agreement with the First National Bank of Jackson, assigning to the trustee most of her rights and interests derived from the estate of her deceased father.[186] She sued the trustee for termination of the trust, which was styled "Irrevocable Trust Agreement."[187] The chancery court held that termination would not be in "the best interest of the complainant" and denied the relief sought.[188] The supreme court reversed and held that a supposedly irrevocable trust can be revoked at any time by a settlor who is the sole beneficiary of the trust.[189]

The *Johnson* court reasoned that since the settlor may in effect revoke the trust by borrowing money and allowing her creditors to proceed against the corpus of the trust, she has the right to dispose of the money at will, even though such actions may not be in her best interest.[190] The court noted that since the complainant had never been adjudicated to be of unsound mind and since there was no showing of any lack of mental capacity, the court should not attempt to shield her from what it perceived to be her own folly.[191] The court's ruling in the instant case brings Mississippi within the majority position and the general rule against restraints on alienation of beneficial interests.[192]

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> If the trustee refuses the settlor's request and insists on continuing the trust administration, the court should and does order him to comply and thus to terminate the trust. It is true that this is not carrying out the intent which the settlor had when he created the trust and when he decided to have his property managed for him and to take its benefits indirectly. But that original intent ought to be of no importance when the settlor has changed his mind and formed new plans with regard to the enjoyment of his own property. His present intent should be carried out.

Id.

[186] 386 So. 2d at 1113.

[187] *Id.*

[188] *Id.* at 1114. The settlor had donated approximately $30,000 to the Church of Scientology and had made numerous demands to the trustee for money which would have come from the corpus of the trust. Some of the requests were granted, and some were not. *Id.*

[189] *Id.* at 1115.

[190] *Id.*

[191] *Id.* at 1114-15. The court stated that in future cases arising out of different facts, it may recognize exceptions to the general rule. *Id.*

[192] *See* RESTATEMENT (SECOND) OF TRUSTS § 339 (1959) (rationale for the general rule stated).

RECENT DECISIONS

MASTER AND SERVANT—DISCHARGE OF AN EMPLOYEE FOR PURSUIT OF A CLAIM UNDER THE MISSISSIPPI WORKMEN'S COMPENSATION LAW GIVES NO PRIVATE RIGHT OF ACTION

Plaintiff[1] brought an action in the Circuit Court of Hinds County seeking actual and punitive damages based on wrongful discharge. Plaintiff alleged that his employment was threatened and subsequently terminated when he refused to dismiss a workers' compensation claim[2] against defendant employer.[3] Furthermore, plaintiff urged the court to adopt a public policy exception[4] to the common law rule that an employment contract for an indefinite time may be terminated at will.[5] The trial court sustained defendant's demurrer on the ground that the complaint failed to state a cause of action.[6] On appeal the Mississippi Supreme Court, *held,* affirmed. Discharge of an employee for his good faith pursuit of a claim under the Mississippi Workmen's Compensation Law does not give rise to a private right of action in tort. *Kelly v. Mississippi Valley Gas Co.*, 397 So. 2d 874 (Miss. 1981).

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[1] Plaintiff was J.C. Kelly, an employee of Mississippi Valley Gas Company. Kelly v. Mississippi Valley Gas Co., 397 So. 2d 874, 874 (Miss. 1981).

[2] Plaintiff allegedly suffered a work-related injury while employed by defendant. *Id.*

[3] Defendant was Mississippi Valley Gas Company, a Mississippi corporation. *Id.*

[4] *Id.* The Mississippi Workmen's Compensation Act, approved August 4, 1968, is codified at MISS. CODE ANN. §§ 71-3-1 to -111 (1972 & Supp. 1980). It provides no remedy for retaliatory discharge and further states at MISS. CODE ANN. § 71-3-9 (1972): "[T]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee . . . ." *Id.; see* Taylor v. Crosby Forest Prods. Co., 198 So. 2d 809, 812 (Miss. 1967) (no action at law available where statutory remedy was exclusive). Since the worker's compensation statute does not provide an exception to the employment at will rule and additionally indicates that it shall be the exclusive remedy for an employee, plaintiff attempted to state a cause of action in tort for wrongful discharge, otherwise separate from and unrelated to his claim for workers' compensation. 397 So. 2d at 874.

[5] *See* Butler v. Smith & Tharpe, 35 Miss. 457, 464 (1858) (employment contract for an indefinite time may be terminated by either party without cause or justification).

[6] 397 So. 2d at 878. Plaintiff's cause of action was based on a common law tort theory. *Id.* at 874; *see* United States v. Madison County Bd. of Educ., 326 F.2d 237, 242 (5th Cir. 1964) (liability created by statute may be enforced by an appropriate common law action, but where statute provides a special remedy only that remedy may be employed).

From the fourteenth century to the nineteenth century, the rights and duties of master and servant depended primarily on the positions each of them held in the feudal society.[7] The legal attitudes regarding those positions were influenced by the paternalistic ideas inherent in the feudal relationship of lord and tenant.[8] Accordingly, common law courts protected the master-servant relationship by prohibiting unjust termination by either party.[9] In addition, a presumption developed that a hiring for an indefinite period[10] amounted to employment for one year,[11] thereby according specific protection to the worker from the threat of summary dismissal.[12] This presumption was initially accepted in American jurisdictions,[13] but later fell into disfavor and was re-

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[7] Note, *A Common Law Action for the Abusively Discharged Employee,* 26 HASTINGS L.J. 1435, 1438 (1975).

[8] *See* 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT §§ 1 & 3 (2d ed. 1913) (cited in Note, *supra* note 7, at 1438) (early legal conceptions of the master-servant relationship).

[9] *See* 2 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 459-60 (3d ed. 1923) (extreme labor shortage caused by the Black Death resulted in a need to protect fourteenth century employers from their employees leaving before the end of the agreed term); *cf.* R. MORRIS, GOVERNMENT AND LABOR IN EARLY AMERICA 17-18 (1946) (cited in Note, *supra* note 7, at 1439 n.17) (documentation indicated that early in the sixteenth century restraints on employment termination were to protect the worker and limit unemployment).

[10] *See* Annot., 11 A.L.R. 469, 469 (1921) (construing an "indefinite hiring" in American law to be equivalent of "general hiring" in English law).

[11] *See* Fawcett v. Cash, 110 Eng. Rep. 1026, 1027 (K. B. 1834) (payment of wages monthly did not rebut presumption that hiring was for a year); Beeston v. Collyer, 130 Eng. Rep. 786, 787 (P.C. 1827) (hiring without mention of time was a general hiring for a year regardless of advance notice by employer to terminate); 1 W. BLACKSTONE, COMMENTARIES* 425 (presumption that indefinite hiring was for a year); 1 C. LABATT, *supra* note 8, at § 156 (same). Blackstone stated that this presumption was based on a principle of natural equity. 1 W. BLACKSTONE at 425.

[12] *See* 6 MEM. ST. U.L. REV. 465, 467 (1976). Where the employment continued for longer than a one year term, the courts implied an additional one year term before the employee could be discharged. *Id.*

[13] *See* Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143, 145 (1891) (general rule of hiring for a one year term applied absent other circumstances); *cf.* Davis v. Gordon, 16 N.Y. 255, 257 (1857) (adopting English rule to cover servants who managed farms).

The employment at will doctrine competed with two other approaches worthy of comment. The first analyzed the surrounding circumstances of the employment relationship to determine what type of contract could be implied. *See* Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 351-68 (1974) (developing a technique for handling recent cases using this approach). The second approach presumed that employment continues for a period identical to the pay period. Moline Lumber Co. v. Harrison, placed by the employment at will rule in the late nineteenth century. The development of the employment at will rule represented a merger of the law governing employment relations into the growing body of contract law.[14] Impetus for this dramatic change in judicial policy came in part from an influential 1877 treatise[15] on master-servant relationships. The treatise writer, purporting to state a generally accepted rule of law in the United States, declared unequivocally that an indefinite hiring is prima facie a hiring at will and that the burden of proof is on the servant to establish it as employment for a prescribed time.[16] This statement of the employment at will rule, though not an accurate reflection of American law at that time,[17] was so widely adopted by courts in the years following its publication[18] that it soon became the standard rule governing the right of discharge.[19] The primary stimulus

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128 Ark. 260, 194 S.W. 25, 26 (1917); Rosenberger v. Pacific Coast Ry., 111 Cal. 313, 43 P. 963, 964 (1896). This rule mitigates the harsh consequences of the employment at will doctrine and is closely related to the English rule. 13 IND. L.J. 172, 174 (1937); 9 MINN. L. REV. 79, 80 (1924). Some commentators believe this rule emerged as the majority rule. Note, *Employment Contracts of Unspecified Duration*, 42 COLUM. L. REV. 107, 108 (1942). *But see* 13 IND. L.J. 172, 174 (1937) (employment duration determined by the pay period was the minority rule). *See generally* Annot., 11 A.L.R. 466, 466-86 (1921) (discussing employment duration).

[14] L. FRIEDMAN, CONTRACT LAW IN AMERICA 18-23 (1965); *see* Farwell v. Boston & W.R.R., 45 Mass. (4 Met.) 49, 56 (1842) (justifying the assumption of risk doctrine, discussed at note 22 *infra,* on the ground that the employee was free to allocate risk in an employment contract); Note, *supra* note 7, at 1440 n.25 (indicating that tort principles governing the employment relationship were interwoven with contract law).

[15] H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT (1877).

[16] *Id.* § 134, at 272.

[17] Wood cited four American cases as authority, none of which supported him. The first case relied on by Wood, Wilder v. United States, 5 Ct. Cl. 462, 464 (1869), *rev'd,* 80 U.S. (13 Wall.) 254, 256 (1871), involved a contract for the carriage of goods, and had no actual relation to employment contracts. H. WOOD, *supra* note 15, § 134 at 272. Another case cited by Wood was DeBriar v. Minturn, 1 Cal. 450, 451 (1851), which held that an innkeeper had the right to eject a person living in his home. *See* H. WOOD, *supra* note 15, § 134 at 272 (citing Tatterson v. Suffolk Mfg. Co., 106 Mass. 56, 60 (1870), and Franklin Mining Co. v. Harris, 24 Mich. 115, 116 (1871)); 6 MEM. ST. U.L. REV. at 468 (discussing Wood's treatise). For other discussions of these cases, see Annot., 11 A.L.R. 469, 476 (1921); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335, 341-42 n.54 (1974).

[18] Notwithstanding the lack of authority, courts which adopted the rule generally relied on Wood's treatise for support. Green v. Arlington Mills Mfg. Co., 17 Del. (1 Penne.) 581, 43 A. 609, 610-12 (1899); McCullough Iron Co. v. Carpenter, 67 Md. 554, 11 A. 176, 178-79 (1887); Martin v. New York Life Ins. Co., 148 N.Y. 117, 42 N.E. 416, 417 (1895).

[19] *See* 1 C. LABATT, *supra* note 8, at § 159 (indicating that the employment at will rule had become the prevailing rule by the beginning of the 20th century); Annot., 11

for the ascension of the rule, however, undoubtedly came from the economic and social pressures which pervaded this period.[20] At the time of the treatise's publication, America was emerging as an industrial society and, thus, an extremely high priority was placed on economic development.[21] The employment at will doctrine was seen as a means of encouraging business expansion and protecting industry by helping to minimize the risks that plagued entrepreneurs.[22] The freedom to discharge under the rule reflected the prevailing *laissez-faire* philosophy[23] of allowing business maximum freedom in directing its affairs, despite the resultant harsh impact on employees.[24]

The employment at will doctrine received significant support in

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A.L.R. 469, 470-71 (1921) (same). For a general discussion of the employment at will rule, see 3A A. CORBIN, CONTRACTS § 684 (1960); 53 AM. JUR. 2D, *Master and Servant* § 43 (1976); Annot., 62 A.L.R. 3d 271, 271-76 (1975).

[20] *See* Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power,* 67 COLUM. L. REV. 1404, 1416 (1967) (small entrepreneur and economic expansion epitomized era); 6 MEM. ST. U.L. REV. at 468 (economic pressure provided stimulus for development of employment relationship).

[21] Note, *supra* note 7, at 1440-41.

[22] Note, *supra* note 7, at 1440. The policy considerations of the era were announced in Tiller v. Atlantic Coast Line R.R., 318 U.S. 54 (1943), where the Supreme Court stated:

> Perhaps the nature of the present problem can best be seen against the background of one hundred years of master-servant tort doctrine. Assumption of risk is a judicially created rule which has developed in response to the general impulse of common law courts at the beginning of this period to insulate the employer as much as possible from bearing the 'human overhead' which is an inevitable part of the cost—to someone—of the doing of industrialized business. The general purpose behind this development in the common law seems to have been to give maximum freedom to expanding industry.

Id. at 58-59.

[23] Note, *supra* note 7, at 1441. A late nineteenth century Tennessee case reflected this influence by questioning: "May I not refuse to trade with anyone? May I not forbid my family to trade with anyone? May I not dismiss my domestic servant for dealing or even visiting, where I forbid? And if my domestic, why not my farm-hand, or my mechanic, or teamster?" Payne v. Western & Atl. R.R., 81 Tenn. 507, 518 (1884), *overruled on other grounds,* Hutton v. Watters, 132 Tenn. 527, 179 S.W. 134, 138 (1915).

[24] *See, e.g.,* Clarke v. Atlantic Stevedoring Co., 163 F. 423, 424-25 (C.C.E.D.N.Y. 1908) (200 Black stevedores hired for permanent positions discharged to make room for White stevedores); Lewis v. Minnesota Mutual Life Ins. Co., 240 Iowa 1249, 37 N.W.2d 316, 324 (1949) (allowing dismissal of company's best salesman without cause notwithstanding promise of lifetime employment in return for remaining with the company); Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872, 876-78 (1936) (allowing dismissal of employee after he had relinquished an established business and moved across state lines with the understanding of obtaining permanent employment as an engineer).

two early twentieth century cases. In 1908 the United States Supreme Court elevated the employer's absolute right to discharge to a constitutionally protected liberty in *Adair v. United States,*[25] and seven years later in *Coppage v. Kansas,*[26] the Court declared the right to hire and fire at will to be a property interest guaranteed by the fourteenth amendment.[27] Both *Adair* and *Coppage* invalidated legislation which prohibited the discharge of an employee for membership in a union.[28] The Court's determination that one should be free to refuse or terminate business relations with an individual for any reason, including prejudice and malice,[29] reflected the influence of philosophical and economic concepts on the legal reasoning of the day.[30]

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[25] 208 U.S. 161, 174 (1908). The Court stated that laws interfering with the "right of the purchaser of labor to prescribe the conditions upon which he will accept such labor from the person offering to sell it" were violative of due process under the fifth amendment. *Id.*

[26] 236 U.S. 1 (1915). The Court expressly stated that *Coppage* could not be distinguished from *Adair. Id.* at 13. The Court declared that freedom to contract is a right of personal liberty and a right of private property, *id.*, equally applicable to both employer and employee. *Id.* at 20.

[27] *Id.* at 17. In explanation the Court added:

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances . . . . [S]ince it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequities of fortune that are the necessary result of the exercise of those rights.

Id.

The Court in *Coppage* emphasized the parties' mutual right to terminate the employment relationship:

> To ask a man to agree, in advance, to refrain from affiliation with the union while retaining a certain position of employment, is not to ask him to give up any part of his constitutional freedom. He is free to decline the employment on those terms, just as the employer may decline to offer employment on any other . . . .

236 U.S. at 21. *Accord,* Pitcher v. United Oil & Gas Syndicate, 174 La. 66, 139 So. 760, 761 (1932) (presumption against an employee engaging his services permanently; but if the contract is not binding on employee, it cannot be binding on employer to avoid lack of mutuality). *See generally* Pound, *Liberty of Contract,* 18 YALE L.J. 454, 454-87 (1909) (discussing the freedom to contract based on an assumption that parties have approximately equal bargaining power).

[28] Coppage v. Kansas, 236 U.S. at 26 (state statute which prohibited employers from prescribing an agreement of union nonmembership as a condition to hiring and continued employment held unconstitutional under fourteenth amendment); Adair v. United States, 208 U.S. at 180 (federal statute prohibiting interstate carriers from dismissing employees for union affiliation unconstitutional under fifth amendment).

[29] 208 U.S. at 173 (quoting T. COOLEY, LAW OF TORTS 278 (1880)).

Mississippi's first definitive endorsement of the employment at will rule came in 1924 in *Rape v. Mobile & Ohio Railroad.*[31] The Mississippi Supreme Court stated that any contrary theory would not only restrict commerce but would be incapable of practical implementation.[32]

Despite the widespread popularity of the employment at will rule in the early twentieth century,[33] legislative and judicial bodies, both state and federal, had by the 1930's begun to realize that the ideal of complete freedom of contract upon which the rule was based was unrealistic and impractical.[34] The true nature of the modern employment relationship revealed that most employees lacked the bargaining power to protect themselves contractually from wrongful discharge.[35] The necessity of some degree of governmental regulation of the employment relationship thus became apparent. A major step in this direction came with the enactment of the National Labor Relations Act in 1935.[36] In upholding the Act in *NLRB v. Jones & Laughlin Steel Corp.*,[37] the United States Supreme Court expressly approved the Act's protection of the right of employees to organize and bargain collectively, free of the employer's coercive power of discharge.[38] The passage of the

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[30] *See* notes 20 through 23 and accompanying text *supra.*

[31] 136 Miss. 38, 100 So. 585 (1924). Plaintiff expended money to accept employment under an alleged oral contract for life employment. The plaintiff averred that his expenditures and the ridicule and threat of bodily harm by strikers while he was employed constituted sufficient consideration to uphold the employment contract. The supreme court found a lack of evidence regarding plaintiff's allegations and concluded that a contract for permanent employment unsupported by independent consideration—consideration other than an obligation of service to be performed in exchange for wages—is terminable at the pleasure of either party. *Id.* at 53, 100 So. at 588; *accord,* Sartin v. City of Columbus, 421 F. Supp. 393, 401 (N.D. Miss. 1976) (agreement for permanent employment absent consideration beyond the rendition of services is terminable at the will of either party); Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 61, 25 So. 2d 572, 576 (1946) (employer had legal right to discharge employee for no reason "and without recommendation" since employee was not employed for fixed term).

[32] 136 Miss. at 50-51, 100 So. at 587.

[33] *See* note 19 and accompanying text *supra.*

[34] *See* Note, *supra* note 7, at 1446. In Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525 (1949), the Supreme Court went so far as to invite state legislatures to end injurious labor practices when it stated:

> This Court beginning at least as early as 1934, . . . has steadily rejected the due process philosophy enunciated in the Adair-Coppage line of cases. In doing so it has consciously returned closer and closer to the earlier constitutional principal that states have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, ... Under this constitutional doctrine the due process clause is no longer to be so broadly construed that . . . state legislatures are put in a strait jacket when they attempt to suppress business and industrial conditions which they regard as offensive to the public welfare.

Id. at 536-37; *cf.* Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 187 (1941) (the authority of *Adair* and *Coppage* has been eroded by subsequent decisions). *See also* Blades, *supra* note 20, at 1404-06 (corporate threat to individual freedom and concentration of economic power gives rise to need to protect economically dependent employees from coercion).

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[35] Note, *supra* note 7, at 1443-46 (realities of modern employment justify judicial restraint of right to discharge); *see* A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 32-33 (1954) (substantiating the existence of inequality of bargaining power); J. GALBRAITH, AMERICAN CAPITALISM 114 (2d ed. 1956) (worker historically vulnerable to private economic power as result of comparative immobility); Tobriner & Grodin, *The Individual and the Public Service Enterprise in the New Industrial State*, 55 CAL. L. REV. 1247, 1252 (1967) (individual's lack of bargaining power results in discrepancy between theory and reality).

The seriousness of the employee's inability to protect himself from discharge as a result of unequal bargaining power in employment relationships has been compounded by the necessity of employment. *See* F. TANNENBAUM, A PHILOSOPHY OF LABOR 9 (1951). Professor Tannenbaum states that:

> [W]e have become a nation of employees. We are dependent upon others for our means of livelihood, and most of our people have become completely dependent upon wages. If they lose their jobs they lose every resource, except for relief supplied by the various forms of social security. Such dependence of the mass of the people upon others for all of their income is something new in the world. *For our generation, the substance of life is in another man's hands.*

Id.

It has been argued that unionization effectually equalizes the bargaining power of the employer and employee through organization and collective bargaining. In NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937), the Court declared that:

> Long ago we stated the reason for labor organizations. We said . . . that a single employee was helpless in dealing with an employer; that he was dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment . . . .

Id. at 33 (citing American Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184, 209 (1921)). *But see* Note, *supra* note 7, at 1443-45 (unionism does not offer sufficient protection to employees).

[36] Ch. 372, 49 Stat. 449 (1935) (codified at 29 U.S.C. §§ 151-159 (1976 & Supp. III 1979)).

[37] 301 U.S. 1 (1937).

[38] *Id.* at 33. The Court concluded that the Act fell within the province of the legislature since it went no further than to safeguard a "fundamental right" of employees. *Id.; see* NLRA §§ 7, 8(a)(1), 29 U.S.C. §§ 157, 158(a)(1) (1976) (protecting right to organize by providing cause of action to employees who assert rights under the act).

NLRA, while protecting only the right to unionize,[39] was not only a practical means of restricting the employment at will doctrine, but also symbolized an end to an economic era characterized by the unrestrained right of the employer to discharge workers.[40] Examples of the substantial progress made in further limiting the employer's power of wrongful discharge since the 1930s may be seen in the extensive state and federal legislation which has been enacted to safeguard certain categories of employees from unjust termination. The protected classes include public employees,[41] veterans,[42] debtors,[43] and the aged.[44] In addition, other statutes have been enacted to effect public policy objectives by proscribing discriminatory discharge on the basis of race, religion, national origin, sex,[45] physical handicap,[46] political affiliation,[47] or the exercise of certain other protected rights.[48]

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[39] Although Congress has the power to protect union activity, the NLRA did not interfere generally with employer prerogatives in firing and hiring. "[T]he Board is not entitled to make its authority a pretext for interference with the right of discharge when that right is exercised for other reasons than [antiunion] intimidation and coercion." 301 U.S. at 45-46. *Accord,* Gulf States Mfrs. v. NLRB, 579 F.2d 1298, 1329 (5th Cir. 1978) (company supervisors violated NLRA by restraining and coercing employees).

[40] *See* Note, *supra* note 7, at 1446.

[41] *See, e.g.,* 5 U.S.C. § 7501(a) (1976) (safeguarding public employees from wrongful discharge); PA. STAT. ANN. tit. 71, § 741.807 (Purdon Supp. 1981) (same).

[42] *See, e.g.,* CAL. MIL. & VET. CODE § 394 (West 1955) (safeguarding veterans from discriminatory practices); OHIO REV. CODE ANN. § 5903.08 (Page Supp. 1980) (same).

[43] *See, e.g.,* Consumer Credit Protection Act of 1968, 15 U.S.C. § 1674(a) (1976) (safeguarding debtors from wrongful discharge); CAL. LAB. CODE § 2929 (West Supp. 1981) (same); D.C. CODE ENCYCL. § 16-584 (West Supp. 1978) (same); HAWAII REV. STAT. § 378-32(1) (1976) (same).

[44] *See, e.g.,* Age Discrimination in Employment Act of 1967 § 4, 29 U.S.C. § 623(a) (1976) (safeguarding the aged from wrongful discharge); CAL. GOV'T CODE § 12941 (West 1980) (same); GA. CODE ANN. § 54-1102 (1974) (same); PA. STAT. ANN. tit. 43 § 955 (Purdon Supp. 1981) (same).

[45] *See, e.g.,* Title VII of the Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e-2(a)(1) (1976) (prohibiting discrimination based on race, color, religion, national origin, or sex); ALASKA STAT. § 18.80.220 (Supp. 1980) (same); CAL. GOV'T CODE § 12940(a) (West 1980) (same); OHIO REV. CODE ANN. § 4112.02(A) (Page 1980) (same); PA. STAT. ANN. tit. 43, § 955 (Purdon Supp. 1981) (same).

[46] *See, e.g.,* CAL. GOV'T CODE § 12940(a) (West 1980) (prohibiting discrimination based on certain physical handicaps); MASS. GEN. LAWS ANN. ch. 149, § 24k (West Supp. 1981) (same); MINN. STAT. ANN. § 363.03(1) (West Supp. 1981) (same); WASH. REV. CODE § 49.60.180 (West Supp. 1981) (same).

[47] *See, e.g.,* CAL. LAB. CODE § 1102 (West 1971) (prohibiting discrimination for political activity or affiliation); NEV. REV. STAT. § 613.040 (1979) (same); *cf.* MISS. CODE ANN. § 79-1-9 (1972) (making it unlawful for a corporation to interfere with social, civil, or political rights of any of its agents or employees).

[48] *See, e.g.,* Fair Labor Standards Act of 1938, § 15(a)(3), 29 U.S.C. § 215(a)(3)

Notwithstanding the legislative limitations on the employment at will doctrine, the courts have been slow to recognize rights of employees in abusive discharge cases falling outside the scope of specific statutory restrictions.[49] However, a growing number of jurisdictions have created narrowly defined public policy exceptions qualifying the employer's absolute right to discharge. In *Petermann v. Teamsters Local 396,*[50] an employee was discharged after he refused to obey his employer's demand to make false statements before a state legislative committee.[51] The California court denied the employer his generally unlimited right to discharge since the dismissal would tend to frustrate the state's declared public policy against perjury.[52]

(1976) (prohibits discharge for exercising rights recognized under the statute or taking part in proceedings instituted under the statute); Occupational Safety & Health Act of 1970, § 11(c), 29 U.S.C. § 660(c) (1976) (same); CAL. GOV'T CODE ANN. § 12940(e) (West 1980) (same).

The legislative activity circumscribing the employer's power to discharge has only resulted in a patchwork scheme protecting specified groups of employees. Note, *supra* note 7, at 1446-47. The United States is currently the only major industrial nation in the world with no statutory provision to protect all employees from wrongful discharge. *Id.* at 1447 n.54. *But cf.* Whittlesey, *Protection Against Discharge Without Cause,* 53 N.Y. ST. B.J. 101, 132 (1981) (piecemeal legislation covering specific public policy is better than blanket coverage of all employees).

[49] *See, e.g.,* Pearson v. Youngstown Sheet & Tube Co., 332 F.2d 439, 441 (7th Cir.) (employer's absolute right to discharge unimpaired), *cert. denied,* 379 U.S. 914 (1964); Hablas v. Armour & Co., 270 F.2d 71, 79 (8th Cir. 1959) (same); Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171, 174 (Dist. Ct. App. 1960) (same); Elliot v. Delta Air Lines, Inc., 116 Ga. App. 36, 156 S.E.2d 656, 656 (1967) (same); May v. Santa Fe Trail Transp. Co., 189 Kan. 419, 370 P.2d 390, 393-94 (1962) (same); Copeland v. Gordon Jewelry Corp., 288 So. 2d 404, 408 (La. App.) (same), *aff'd,* 290 So. 2d 911 (1974); Montgomery Ward & Co. v. Skinner, 200 Miss. 44, 61, 25 So. 2d 572, 576 (1946) (same).

Although a majority of courts have demonstrated a persistent willingness to uphold the employment at will rule, it has been severely criticized by commentators. *See generally* Blades, *supra* note 20, at 1404 (discussing trend to recognize certain exceptions to common law rule); Blumburg, *Corporate Responsibility and the Employee's Duty of Loyalty and Obedience: A Preliminary Inquiry,* 24 OKLA. L. REV. 279 (1971) (same); Blumrosen, *Settlement of Disputes Concerning the Exercise of Employer Disciplinary Power: United States Report,* 18 RUTGERS L. REV. 428 (1964) (same); Comment, *Protecting the Private Sector At Will Employee Who "Blows the Whistle": A Cause of Action Based Upon Determinants of Public Policy,* 1977 WIS. L. REV. 777 (same); Note, *Implied Contract Rights to Job Security,* 26 STAN. L. REV. 335 (1974) (same); Note, *supra* note 7, at 1435 (same).

[50] 174 Cal. App. 2d 184, 344 P.2d 25 (Dist. Ct. App. 1959).

[51] 344 P.2d at 26.

[52] *Id. Petermann* cannot be regarded as a rejection of the at will rule by California courts in the absence of statutory expression of policy by the legislature. *See* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171, 174 (Dist. Ct. App. 1960) (although plaintiff's discharge for reporting for jury service was deplorable, plaintiff had no cause of

A New Hampshire court further eroded the employment at will rule in *Monge v. Beebe Rubber Co.*,[53] by granting a contractual remedy in the absence of any relevant legislation regarding the right of an employer to discharge an employee.[54] The case arose when plaintiff was discharged for having refused the advances of her foreman.[55] The court held for the plaintiff, stating that termination of an employee which was motivated by bad faith or retaliation was not in the interest of the public good and constituted a breach of the employment contract.[56] The decision was based on the premise that society as a whole held an important interest in the employment relationship, an interest which directly conflicted with the employer's absolute right to discharge.[57]

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action in the absence of legislation).

On remand *Petermann* was tried without a jury, resulting in a judgment for plaintiff that the discharge was unlawful and a damage award of $50,000. This judgment was thereafter affirmed by a different division of the same appellate court. Petermann v. Teamsters Local 396, 214 Cal. App. 2d 155, 29 Cal. Rptr. 399, 402 (Dist. Ct. App. 1963).

The statutory policy against perjury announced in *Petermann* was not related to the employment relationship. Where there is no express relation between public policy and the employment contract, the plaintiff must demonstrate that the denial of the cause of action will adversely affect a broad social need. *See* Comment, *supra* note 49, at 793; *cf.* Montalro v. Zomora, 7 Cal. App. 3d 69, 86 Cal. Rptr. 401, 404 (Dist. Ct. App. 1970) (employee must show some right granted to him where defined public policy concerns employment relationship).

[53] 114 N.H. 130, 316 A.2d 549 (1974).

[54] 316 A.2d at 551.

[55] *Id.* at 550.

[56] *Id.* at 551. Characterizing plaintiff's action as a breach of contract precluded punitive damages and damages for mental distress that are recoverable in a tort action. *Id.* at 552. *See* RESTATEMENT OF CONTRACTS § 341 (1932) (recovery for mental suffering is not awarded in contract actions). *Compare* 5 A. CORBIN, CONTRACTS § 1077 (1964) (punitive damages not recoverable in contract actions) *with* W. PROSSER, THE LAW OF TORTS § 2 (4th ed. 1971) (punitive damages recoverable in tort). *See also* 6 MEM. ST. U.L. REV. at 478-80 (favoring a tort theory to avoid requirement of consideration).

[57] 316 A.2d at 551. "In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interests of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two." *Id.* A rule proscribing termination motivated by bad faith, malice, or retaliation affords the employee stability of employment and permits the employer's normal exercise of his right to discharge for efficient and profitable operation of his business. *Id.* at 551-52.

The following factors might be considered when applying the balancing of interests test: (1) the harmful effect that retaliatory discharge will have on other employees exercising their legal rights, Note, *California's Control on Employer Abuse of Employee Political Rights*, 22 STAN. L. REV. 1015, 1030 (1970); (2) the motive underlying the employer's discharge of employee as revealed by the surrounding circumstances, *id.* at 1045; and, (3) whether the discharge was an unreasonable intrusion into the employer's private life. Blades, *supra* note 20, at 1407.

An alternate approach to the *Monge* decision was taken in *Nees v. Hocks,*[58] a case in which the plaintiff was dismissed because she had served on a jury in disregard of her employer's instruction.[59] Plaintiff brought the action in tort, seeking to establish a public policy exception to the employment at will rule[60] rather than relying on contract principles.[61] The Oregon court awarded damages,[62] but explicitly limited the public policy exception regarding jury duty to a specific showing of a social detriment caused by the discharge.[63] Although the availability of such a remedy strengthens the position of discharged workers, the classification of wrongful discharge as a tort does not completely alleviate the employee's plight. Problems remain because, while a discharged employee must prove the employer breached a duty owed to the employee,[64] the right to discharge an at will employee remains a near-absolute right.[65]

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[58] 272 Or. 210, 536 P.2d 512 (1975).

[59] 536 P.2d at 512-13.

[60] *Id.* at 513. Although the case was one of first impression in Oregon, the court stated that it would not be restricted by pre-existing common law remedies but would recognize new tort actions for conduct causing compensable injuries. *Id.* at 514. The court indicated:

> We are called upon, as Mr. Justice Holmes says . . . 'to exercise the sovereign prerogative of choice' between the view that the courts for want of a precedent are impotent to grant redress for injury resulting from conduct which universal opinion in a . . . civilized society would unhesitatingly condemn as indecent and outrageous, and the view that the common law, with its capacity for growth and expansion and its adaptability to the needs and requirements of changing conditions, contains within itself the resources of principle upon which relief in such a case can be founded . . . .

Id. (quoting Hinish v. Meier & Frank Co., 166 Or. 482, 113 P.2d 438, 446 (1941) (created action for intentional invasion of privacy)).

[61] *See* note 56 and accompanying text *supra.*

[62] 536 P.2d at 516. Employer's interference with the policy the court sought to protect necessitated the response in damages for any injury done. *Id.* at 515. The court refused to award punitive damages, however, since there was no evidence that the practice of discharging employees for serving on juries was common or would continue in the future. *Id.* at 516.

[63] *Id.* at 515-16. The court distinguished the jury duty situation from situations involving purely private employment interests. *Id.* This narrowly defined exception rested on the absence of a state statute that defined the public policy involved. Comment, *supra* note 49, at 796.

For other cases discussing narrowly defined policy exceptions to the employment at will rule, see Mallard v. Boring, 182 Cal. App. 2d 390, 394, 6 Cal. Rptr. 171, 174 (Dist. Ct. App. 1960) (denying cause of action where employee reported for jury service); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 180 (1974) (denying cause of action when employee dismissed for bypassing immediate superiors to inform company vice president that product was defective and dangerous); Reuther v. Fowler & Williams, Inc., 255 Pa. Supp. 28, 386 A.2d 119, 120-21 (Pa. Super. Ct. 1978) (granting cause of action where employer refused to release employee for jury service).

Some courts have found that an employer has breached a duty owed to an employee when an employee is discharged for his good faith pursuit of a workers' compensation claim. The landmark case of *Frampton v. Central Indiana Gas Co.,*[66] which arose when plaintiff was discharged one month after she filed a compensation claim,[67] was the earliest decision that provided a private cause of action for abusive discharge in the workers' compensation area.[68] In making available to the plaintiff a novel civil remedy in this area of the law, the Indiana court reasoned that since the purpose of the workers' compensation law was to give an employee a right of reimbursement for work related injuries,[69] a private remedy must be implied when an employer has at-

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[64] *See* W. PROSSER, *supra* note 56, § 1 at 1 n.1 (a tort is "a breach of a duty . . . which gives rise to an action for damages").

[65] *See* note 49 and accompanying text *supra.* "[I]t is evident that neither the common law nor statutory law, nor . . . [employer] practices thereunder afford employees any protection from the arbitrary and capricious exercise by the employer of his power to discharge . . . so long as there is no discrimination because of union activities, race, color, sex, or age." Weyand, *Present Status of Individual Employee Rights,* N.Y.U. TWENTY-SECOND ANNUAL CONFERENCE ON LABOR 171, 185-86 (1970) (quoted in 6 MEM. ST. U.L. REV. at 478).

[66] 260 Ind. 249, 297 N.E.2d 425 (1973).

[67] 297 N.E.2d at 426-27.

[68] 2A A. LARSON, LAW OF WORKMEN'S COMPENSATION § 68.36 at 73-76 (Supp. 1980). Professor Larson stated, "It is odd that such a decision was so long in coming. Perhaps the explanation may lie in the fact that the conduct involved is so contemptible that a few modern employers would be willing to risk the opprobrium of being found in such a posture." *Id.*

The early decisions considering an employee's right of action for wrongful discharge as a result of pursuit of a worker's compensation claim denied recovery. *See* Narens v. Campbell Sixty-Six Express, Inc., 347 S.W.2d 204, 205 (Mo. 1961) (allegation of breach of contract failed to state a claim for relief); Christy v. Petrus, 365 Mo. 1187, 296 S.W.2d 122, 126 (1956) (employee denied private right of action since legislature did not expressly provide for such remedy); Raley v. Darling Shop, 78 S.C. 445, 59 S.E.2d 148, 149 (1950) (no tort exists where employee continues to prosecute claim).

[69] 297 N.E.2d at 427. Prior to worker's compensation, the only remedy of the injured employee was to bring an action in tort against the employer. Because these actions were rarely successful due to assumption of risk and contributory negligence, workers' compensation laws were created to transfer economic loss from employment injuries to the industry and ultimately to the consumer. *Id.* Professor Larson described the underlying social policy of the workers' compensation laws in this manner:

> The ultimate social philosophy behind compensation liability is belief in the wisdom of providing in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obligated to provide in any case in

tempted to contravene that policy through the use of the discharge power.[70]

The court added that to allow an employer to penalize his employees for filing claims would cause employees to refuse to exercise their statutory right[71] for fear of losing their employment.[72] As a result the

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some less satisfactory form . . . .

1 A. LARSON, LAW OF WORKMEN'S COMPENSATION § 2.20, at 5-9 (1978).

The policy of the Mississippi Workmen's Compensation Act is similar to that of the Indiana statute. In Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888 (Miss. 1980), the court precisely stated the legislative purpose and public policy of the Mississippi act: "The singular purpose pervading the Workmen's Compensation Act is to promote the welfare of laborers within the state . . . . As remedial legislation to compensate and make whole, . . . it should be construed fairly to further its humanitarian aims . . . . Doubtful cases must be compensated . . . ." *Id.* at 889 (citations omitted). *See* Evans v. Continental Grain Co., 372 So. 2d 265, 269 (Miss. 1979) (the compensation statutes should be construed liberally and doubtful cases should be resolved in favor of claimants); McCluskey v. Thompson, 363 So. 2d 256, 261 (Miss. 1978) (act should transfer from worker to industry and consumer economic loss from accidents arising in course of business); Nowlin v. Lee, 203 So. 2d 493, 496 (Miss. 1967) (act was adopted to provide for welfare of laborers in the state); LE-CO Gin Co. v. Stratton, 241 Miss. 623, 631, 131 So. 2d 450, 451 (1961) (purpose of act is to substitute for employee's common law tort action a fixed measure of relief without regard to negligence); Stanley v. McLendon, 220 Miss. 192, 199, 70 So. 2d 323, 326 (1954) (to substitute the loss of support for those dependent on the employee); Barry v. Sanders Co., 211 Miss. 656, 660, 52 So. 2d 493, 494 (1952) (to relieve industry of risks within prescribed monetary limits). *See also* MISS. CODE ANN. § 71-3-1 (1972) (defining the act); V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION § 2, at 1-2 (2d ed. 1967) (explaining the purpose of the act).

[70] 297 N.E.2d at 427-28. Where a statute imposes a right and a corresponding duty, but is silent as to the means of enforcing the right, the courts may imply a private action to effectuate the law. The courts must look to the law and the ends sought by the legislature in construction and interpretation. 2A J. SUTHERLAND, STATUTORY CONSTRUCTION § 45.05 (4th ed. 1973). In doing so, courts must determine if the legislative intent is to preclude a private remedy or to provide such a remedy by implication. *Id.* at § 55.03-.04. The individual who seeks the remedy must show that he is among the class of individuals for whose benefit the law was passed. *See generally* RESTATEMENT (SECOND) OF TORTS § 87A (Tent. Draft No. 23, 1977) (court may provide civil remedy to assure effectiveness of legislative provision requiring certain conduct for the benefit of a class of persons). *See also* Note, *Implying Civil Remedies from Federal Regulatory Statutes,* 77 HARV. L. REV. 285 (1963) (interpretation of private causes of action from statutes); Comment, *Private Right from Federal Statutes: Towards a Rational Use of Borak,* 63 N.W.U.L. REV. 454 (1968) (same).

[71] 297 N.E.2d at 426-27. IND. CODE ANN. § 22-3-2-15 (Burns Supp. 1980) provides that: "No contract or agreement, written or implied, no rule, regulation or other device shall, in any manner, operate to relieve any employer in whole or in part of any obligation created [by this act]."

[72] 297 N.E.2d at 427. To uphold retaliatory discharge would promote coercion and duress in employment relations and would, in effect, be "arming unethical employers with common law authority." *Id.* at 428. The court found the threat of discharge to be a

employer would be effectively relieved of the duty to pay workers' compensation benefits.[73] Lacking definitive authority for its decision,[74] the court analogized to cases granting a private right of action to tenants who faced retaliatory eviction for reporting housing violations.[75]

Three years after *Frampton,* a Michigan court was also asked to create a private action for an employee discharged for filing a workers' compensation claim. In *Sventko v. Kroger Co.,*[76] the court had to determine the legislative purpose behind a section of the Michigan Work-

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"device" under IND. CODE ANN. § 22-3-2-15 (Burns Supp. 1980) and in direct opposition to public policy. 297 N.E.2d at 428. The broad interpretation of state workers' compensation law is in agreement with the general treatment given to such legislation. *See* 2A J. SUTHERLAND, *supra* note 70, at § 54.05.

One year after the *Frampton* decision, Stephens v. Justiss-Mears Oil Co., 300 So. 2d 510 (La. Ct. App. 1974) distinguished the earlier decision on the pretense that the plaintiff in *Frampton* filed for compensation benefits while still employed, whereas the plaintiff in *Stephens* filed nine months before he returned to work. *Id.* at 511. Although LA. REV. STAT. ANN. § 23:1033 (West 1964) is almost identical to the Indiana statute, the court concluded that the right of the employee to pursue a compensation claim without fear of discharge was not present. 300 So. 2d at 511. This rationale overlooks the obvious public policy issue that the right to return to work is equally as important as the right not to be dismissed from employment.

[73] 297 N.E.2d at 427. The court indicated that:

> [t]he Act creates a *duty* in the employer to compensate employees for work-related injuries . . . and a *right* in the employee to receive such compensation. But in order for the goals of the Act to be realized and for public policy to be effectuated, the employee must be able to exercise his right in an unfettered fashion without being subject to reprisal.

Id. Thus, if the employer breaches his duty, any injury should give rise to a cause of action in tort for the employee.

[74] *Id.* at 428. Before *Frampton,* no jurisdiction had held that a wrongful discharge resulting from the pursuit of worker's compensation benefits was actionable. *Id. But see* Petermann v. Teamsters Local 396, 174 Cal. App. 2d 184, 344 P.2d 25, 27 (Dist. Ct. App. 1959) (allowing private cause of action when public policy was implied from statute and unrelated to the employment relationship).

[75] 297 N.E.2d at 428. The court stated that "[h]ousing codes are promulgated to improve the quality of housing. The fear of retaliation for reporting violations inhibits reporting and, like the fear of retaliation for filing a claim, ultimately undermines a critically important public policy." *Id. See, e.g.,* Edwards v. Habib, 397 F.2d 687, 701 (D.C. Cir. 1968) (under D.C. housing code, landlord cannot evict tenant in retaliation for reporting housing code violations), *cert. denied,* 393 U.S. 1016 (1969); Aweeka v. Bonds, 20 Cal. App. 3d 278, 97 Cal. Rptr. 650, 651-52 (Ct. App. 1971) (retaliatory eviction states a private right of action); Schweiger v. Superior Court, 3 Cal. 3d 507, 90 Cal. Rptr. 729, 476 P.2d 97, 103 (Ct. App. 1970) (establishment of retaliatory motive bars eviction); Dickhut v. Norton, 45 Wis. 2d 389, 173 N.W.2d 297, 302 (1968) (landlord cannot terminate tenancy at will or from month to month in retaliation for tenant's reporting housing code violations).

[76] 69 Mich. App. 644, 245 N.W.2d 151 (1976).

men's Compensation Act which made consistent discharge of employees to evade provisions of the Act a misdemeanor.[77] The court first stated that the terminable at will rule could be overcome for reasons of public policy.[78] The court then determined that plaintiff's discharge fell into the actionable class of exceptions because it was contrary to the public policy evinced by the compensation statute.[79] Therefore, the court permitted a private remedy when it was shown that to do so would further the intent of the legislature.[80]

In order to discourage the widespread practice of discharging employees who pursued claims,[81] the Texas legislature enacted a private cause of action in that state's workers' compensation statute.[82] In

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[77] MICH. COMP. LAWS ANN. § 418.125 (West Supp. 1981). The fact that the legislature had not specifically imposed a criminal sanction on retaliatory discharge for pursuit of workers' compensation claims was no indication of legislative approval of such conduct. 245 N.W.2d at 154. This rationale is analogous to that of the *Frampton* court in that it creates a civil remedy by considering the underlying purposes of the statute.

Contradictory results were reached by different panels of the Illinois Fourth District Appellate Court on the same day in determining whether to provide a private cause of action in the absence of legislative provision of a remedy. *Compare* Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 1146 (1977) (retaliatory discharge is actionable), *with* Kelsay v. Motorola, Inc., 51 Ill. App. 3d 1016, 366 N.E.2d 1141, 1143-44 (1977) (no cause of action). The court of appeals requested certification to the Illinois Supreme Court to resolve the inconsistency. Leach v. Lauhoff Grain Co., 51 Ill. App. 3d 1022, 366 N.E.2d 1145, 1149 (1977). The supreme court reasoned that although the Illinois Workmen's Compensation Act provides that it shall be the exclusive measure of employer responsibility, it would be illogical to bar an action on the language of the act itself, the purpose of which is to provide remedies to employees with compensable claims. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978). *See* note 4 *supra* (discussing the exclusive nature of the employer's liability under Mississippi's workers' compensation law).

[78] 245 N.W.2d at 153. "[A]n employer at will is not free to discharge an employee when the reason for the discharge is an intention on the part of the employer to contravene the public policy of this state." *Id.*

[79] *Id.* at 153-54. The legislative policy of the workers' compensation act is to provide benefits to the victims of work related injuries in an expeditious manner. The court stated that discouraging the fulfillment of this legislative policy by threatening termination of an employee would be contrary to the public policy of the state. *Id.* at 153; *see* Whetro v. Awkerman, 383 Mich. 235, 174 N.W.2d 783, 787 (1970) (policy to place cost of industrial injuries on business and consumers). Compare the discussion at note 69 *supra*, regarding the purposes of the Indiana and Mississippi statutes, with that expressed in *Whetro* regarding the function of the Michigan law.

[80] 245 N.W.2d at 153-54.

[81] *See* Note, *Remedies for Wrongful Discharge Under the Texas Workmen's Compensation Act—The Need for Revision,* 4 TEX. TECH. L. REV. 387, 389 (1973) (discussing problems of wrongful discharge in Texas).

[82] *See* TEX. REV. CIV. STAT. ANN. art. 8307(c) (Vernon Supp. 1980). The statute provides in part:

Texas Steel Co. v. Douglas,[83] the court concluded that the receipt of medical and disability benefits was an "institution of a proceeding" under the act which allowed the employee to recover past and future damages.[84] The Texas court rationalized that this prevented the employer from circumventing the act by firing the employee before he filed his claim.[85]

North Carolina enacted a statute[86] similar to the Texas statute after an employee was denied a cause of action for retaliatory discharge for asserting his rights under the state's workers' compensation law in *Dockery v. Lampart Table Co.*[87] The *Dockery* court rejected *Frampton,*[88] noting the lack of authority for its creation of a private

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> Sec. 1. No person may discharge or in any other manner discriminate against any employee because the employee has in good faith filed a claim, hired a lawyer to represent him in a claim, instituted, or caused to be instituted, in good faith, any proceeding under the Texas Workmen's Compensation Act or has testified or is about to testify in any such proceeding.
>
> Sec. 2. A person who violates any provision of Section 1 of this Act shall be liable for reasonable damages suffered by an employee as a result of the violation, and an employee discharged in violation of the Act shall be entitled to be reinstated to his former position. The burden of proof shall be on the employee.

Id. Other states providing a private cause of action by statute include: CAL. LAB. CODE § 132a (West Supp. 1981) (providing private right of action for wrongful discharge for pursuit of claim under compensation act); HAW. REV. STAT. § 378-32(2) (1976) (same); ME. REV. STAT., tit. 39, § 111 (1978) (same); N.J. STAT. ANN. § 34:15-39.1 (West Supp. 1981) (same); N.Y. WORK. COMP. LAW § 120 (McKinney Supp. 1980) (same); OKLA. STAT. ANN. tit. 85, § 5 (West Supp. 1980) (same); WIS. STAT. ANN. § 102.35 (1973 & West Supp. 1980) (same).

[83] 533 S.W.2d 111 (Tex. Civ. App. 1976).

[84] *Id.* at 115.

[85] *Id. See* Schrader v. Artco Bell Corp., 579 S.W.2d 534, 539-40 (Tex. Civ. App. 1979) (burden of proof was on employee to demonstrate that he was able to perform duties of his job); A.J. Foyt Chevrolet, Inc. v. Jacobs, 578 S.W.2d 445, 447 (Tex. Civ. App. 1979) (employee discharged for hiring an attorney to assist in recovering a claim).

[86] *See* N.C. GEN. STAT. § 97-6.1 (1979) (providing cause of action for wrongful discharge under workers' compensation act).

[87] 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied,* 295 N.C. 465, 246 S.E.2d 215 (1978).

[88] 244 S.E.2d at 274-75. N.C. GEN. STAT. § 97-6 (1979) is virtually identical to the Indiana statute in *Frampton* prohibiting "devices" which relieve the employer of his obligation under the workmen's compensation act. North Carolina, however, has never clearly defined "device" and as a result the court was reluctant to use the premise to give the employee a cause of action. *See* Ashe v. Barnes, 255 N.C. 310, 121 S.E.2d 549, 553 (1961) (indicating that a device may be the substitution of accident insurance in lieu of benefits under the act).

remedy[89] and pointing out that North Carolina, unlike Indiana, expressly rejected retaliatory eviction as an affirmative defense.[90] The court determined that the question was one best answered by the legislature and thus refused to provide a remedy in the absence of express legislation.[91]

In contrast to *Dockery,* an Oregon court in *Brown v. Transcon Lines*[92] allowed a common law action[93] without relying on the implication of a remedy by legislative provisions.[94] The court quoted from its earlier decision in *Nees v. Hocks*[95] and concluded that there could be circumstances in which an employer discharges an employee for such socially undesirable motives that the employer must respond in damages for any injury done.[96]

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[89] 244 S.E.2d at 274-75; *accord* Martin v. Tapley, 360 So. 2d 708, 709-10 (Ala. 1978) (plaintiff was compensated for his claim and therefore contractual duty under the workers' compensation act was satisfied); Segal v. Arrow Indus. Corp., 364 So. 2d 89, 90 (Fla. Dist. Ct. App. 1978) (declining to follow the reasoning in *Frampton* without discussing the issues).

[90] *See* Evans v. Rose, 12 N.C. App. 165, 182 S.E.2d 591, *cert. denied,* 279 N.C. 511, 183 S.E.2d 686 (1971) (retaliatory eviction not a defense).

[91] 244 S.E.2d at 276-77. In the court's view, any action to make retaliatory discharge a tort in North Carolina would constitute impermissible judicial legislation. Thus, such action must be taken by the legislature. *Id.; accord,* Sventko v. Kroger Co., 69 Mich. App. 644, 245 N.W.2d 151, 155-56 (1976) (dissent criticized majority for engaging in judicial legislation).

The court avoided the public policy issue discussed in *Frampton* since the plaintiff failed to allege as fact the chilling effect that wrongful discharge has on employees' pursuit of claims. 244 S.E.2d at 276. The "chilling effect" approach had its roots in constitutional law. The theory was implemented to provide a cause of action for conduct designed to "chill" the exercise of fundamental rights. *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 275 (1965) (partial closing of business is unfair labor practice when motivated by desire to chill unionism).

For discussion of possible theories of recovery in view of the decision in *Dockery,* see 58 N.C.L. Rev. 629, 634-35 (1980) (prima facie tort); 15 Wake Forest L. Rev. 139, 149-51 (1979) (balancing of interests).

[92] 284 Or. 597, 588 P.2d 1087 (1975).

[93] 588 P.2d at 1091.

[94] *Id.* at 1090. Or. Rev. Stat. § 659.410 (1979) makes discrimination against an employee who has filed a workers' compensation claim unlawful. The Oregon statute further provides that an employee wrongfully discharged may pursue his complaint with the Bureau of Labor. *Id.* § 659.435.

In acknowledging the right given to plaintiff under the statute, the *Brown* court expressly stated that plaintiff had a common law cause of action not based upon or implied from the Oregon legislation. 588 P.2d at 1090. Furthermore, the court stated that the statutory provision was only useful in that case as an indication of public policy regarding discharge of an employee for making a workers' compensation claim. *Id.* at 1087. *But see* Cook v. Caterpillar Tractor Co., 85 Ill. App. 3d 831, 407 N.E.2d 95, 98-99 (1980) (employee who failed to use the recourse provided under a collective bargaining agreement had no action in tort).

[95] 272 Or. 210, 536 P.2d 512 (1975).

Similar issues were recently considered in *Green v. Amerada-Hess Corp.*[97] The case was brought on appeal from the United States District Court for the Southern District of Mississippi and involved a diversity action based on plaintiff's claim of wrongful discharge from employment for pursuing his rights under Mississippi's workers' compensation law.[98] The Court of Appeals for the Fifth Circuit concluded that in the absence of statutory provision for a civil action[99] or controlling precedent,[100] the issue could be resolved by Mississippi's adherence to the employment at will rule.[101] The court stated that although the creation of a private cause of action for retaliatory discharge would be considered wise and progressive social policy,[102] it would be improper for a federal appellate court to take such action without some corresponding state statutory authorization.[103]

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[96] 588 P.2d at 1090; *see* Lally v. Copygraphics, 173 N.J. Super. 162, 413 A.2d 960, 980 (Super. Ct. App. Div. 1980) (because of public interest against retaliatory discharge plaintiff may pursue either a judicial or administrative remedy), *aff'd*, 85 N.J. 668, 428 A.2d 1317 (1981).

The New Jersey appeals court summarized the public policy sentiments:

> Although the courts of other jurisdictions which have considered the issue have expressed diverse views for divergent reasons on the question of availability of a civilly prosecuted compensatory remedy for an employee who has been the victim of retaliatory discrimination, all are agreed as to the opprobriousness of such retaliatory conduct, its grave potential for undermining the remedial purposes and functioning of the workers' compensation scheme and hence its oppugnance to public policy of longstanding legislative solicitude and overriding public concern.

413 A.2d at 963.

[97] 612 F.2d 212 (5th Cir. 1980). Another recent Fifth Circuit decision, Smith v. Atlas Off-Shore Boat Serv., Inc., 653 F.2d 1057 (5th Cir. 1981), allowed a remedy in admiralty for a seaman employed at will when his employment was terminated because he filed a suit against his employer under the Jones Act, 46 U.S.C. § 688 (1976). The Act differs from workers' compensation in that it allows a seaman to maintain an action for employment-related injuries. 653 F.2d at 1058. Unable to find maritime cases addressing the issue of wrongful discharge, the court found guidance in the nonmaritime common law. *Id.* at 1060. The court reasoned that although discharge of an at will seaman-employee is in essence a lawful act, "[t]he employer should not be permitted to use his absolute discharge right to retaliate against a seaman for seeking to recover what is due him or to intimidate the seaman from seeking legal redress . . . ." *Id.* at 1062 (citing Blades, *supra* note 20, at 1424). Thus, in forming a remedy for behavior characterized as an intentional tort, the court allowed damages resulting from the termination. 653 F.2d at 1064. These damages included expenses of finding new employment, lost earnings while seeking another job, and lost future earnings if the new position provides less pay than that earned while in the employ of the discharging employer. *Id.* In denying punitive damages, the court stated "[t]he additional deterrent effect such damages might produce . . . is insufficient to justify their imposition." *Id.* However, it indicated that upon remand, in addition to economic losses, damages for mental anguish may be recoverable. *Id.* at 1064-65. The court also set forth precepts guiding resolution of issues of proof by stating that:

> In order to prevail on the retaliatory discharge claim, the seaman must affirmatively establish that the employer's decision was motivated in substantial part by the knowledge that the seaman either intends to file, or has already filed, a personal injury action against the employer. The employer may, on the other hand, defeat the seaman's action by demonstrating that the personal injury action was not a substantial motivating factor for the discharge.

Id. at 1064.

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[98] 612 F.2d at 213-14.

[99] *Id.* at 214; *see* note 4 *supra.*

[100] 612 F.2d at 214. Mississippi courts had not decided the issue of whether to impose liability on an employer for retaliatory discharge. *Id.*

[101] *Id.* The court stated that special weight must be given to the determination of the district court judge because of his familiarity with local laws. *Id.; see* Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 204 (1956) (special consideration given to findings regarding Vermont law made by a federal district judge who was member of Vermont bar). The District Court for the Southern District of Mississippi said that Mississippi follows the rule that an employer has the legal right to discharge employees hired for an indefinite term without justification. 612 F.2d at 214; *see* notes 5, 31, 32 and accompanying text *supra* (indicating that Mississippi follows the employment at will rule).

[102] 612 F.2d at 214. In Loucks v. Star City Glass Co., 551 F.2d 745 (7th Cir. 1977), the court stated that regardless of the hardship inflicted on the discharged employee and the bad motives of the employer, the judiciary should not rewrite the employment contract. *Id.* at 747; *accord,* Love v. Mississippi Cotton Seed Prods. Co., 161 Miss. 704, 709, 137 So. 739, 740 (1931) (fundamental principles cannot be set aside for convenience or to prevent hardship).

[103] 612 F.2d at 214-15. The court interpreted the legislative intent of the Mississippi act to mean that employees will be excluded from protection against retaliatory discharge and will not be provided additional remedies from those in the statute. *Id.* This reasoning is inconsistent with the purposes of the act. *See* L.B. Priester & Son, Inc. v. Dependants of Bynum, 244 Miss. 185, 197-98, 142 So. 2d 30, 31 (1962) (legislative intent necessitates fair construction in order to carry out remedial purposes of the Act); Treken v. Grafe Auto Co., 232 Miss. 854, 857, 100 So. 2d 786, 787 (1958) (policy should be adopted that accords with legislative intent); Lindsey v. Ingalls Shipbuilding Corp., 219 Miss. 437, 447, 68 So. 2d 872, 877 (1954) (humanitarian purpose of the Act should not be defeated by overemphasis on technicalities); V. DUNN, *supra* note 69, §§ 31 & 32, at 31-36 (proper construction of the Act).

Furthermore, Mississippi subscribes to the rule that the common law may be repealed, changed, or modified by statute. Hemingway v. Scales, 42 Miss. 1, 16 (1868); *see* Agristor Credit Corp. v. Lewellen, 472 F. Supp. 46, 50 (N.D. Miss. 1979) (common law prevails unless modified by statute); Interstate Life & Accident Co. v. Pannell, 169 Miss. 50, 59, 152 So. 635, 638 (1934) (same, construing Tennessee law).

Therefore, since the purpose of the Mississippi Workmen's Compensation Act is to promote the welfare of laborers in the state, and since an interpretation should be given to the statute which accords with that intent, the circuit court could have permitted a modification of the common law employment at will rule. Providing a remedy to an em-

In the instant case, the court[104] noted that the Mississippi Workmen's Compensation Law[105] did not expressly provide a remedy for retaliatory discharge[106] and therefore declined to engage in the formulation of a common law tort action.[107] The court reasoned that because it was bound to preserve the separation of powers mandated by the Mississippi constitution,[108] and since judicial restraint must be exercised when interpreting acts of the legislative department,[109] the creation of the remedy sought by plaintiff[110] would be an improper intrusion on

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ployee discharged for pursuing a compensation claim could prevent circumvention of the workers' compensation statute and would promote its purpose. *See* note 69 and accompanying text *supra.* Had this conclusion been reached and plaintiff been provided a private cause of action, the foregoing analysis indicates that the court would *not* have been engaging in judicial legislation. Moreover, the above reasoning offers what many would consider a proper construction of the statute and a realization of its purpose. A contrary view was expressed at 82 HARV. L. REV. 932, 934 (1969), wherein the author argued that a "court's assumption of power . . . in accordance with pressing social needs violates the accepted canon of construction that statutes will not be interpreted to effect a change in right-duty relationships well established at common law in the absence of specific statutory language to that effect."

[104] The judgment of the court was announced by Justice Sugg, joined by Chief Justice Patterson and Justices Smith, Robertson, and Walker. Justices Broom, Lee, and Hawkins concurred and Justice Bowling took no part. Kelly v. Mississippi Gas Co., 397 So. 2d 874, 877 (Miss. 1981).

[105] MISS. CODE ANN. §§ 17-3-1 to -11 (1972 & Supp. 1980).

[106] *See* note 4 and accompanying text *supra; cf.* Conway v. State Bd. of Health, 252 Miss. 315, 322-23, 173 So. 2d 412, 414-15 (1965) (plain and unambiguous language of the legislature is construed by the courts to mean what is clearly expressed); Board of Disability & Relief v. Hudson, 229 Miss. 631, 637-38, 91 So. 2d 718, 721 (1957) (same); Memphis v. State Tax Comm'n, 210 Miss. 590, 598-99, 49 So. 2d 410, 411 (1950) (same); City of Hazlehurst v. Mayes, 96 Miss. 656, 665, 51 So. 890, 891 (1910) (same).

[107] 397 So. 2d at 877; *see* Moore v. Grillis, 205 Miss. 865, 888, 39 So. 2d 505, 509 (1949) (courts should not decide whether law is needed and advisable, but should simply interpret law and apply it to facts of case); Darnell v. Johnson, 109 Miss. 570, 574, 68 So. 780, 782 (1915) (court is not concerned with the "policy or impolicy" of legislature, but with interpretation of the legislation).

[108] MISS. CONST. art. 1, § 1. The judicial department must give recognition to constitutional acts of the legislative department. 397 So. 2d at 877; *see* State v. Traylor, 100 Miss. 554, 558, 56 So. 521, 522-23 (1911) (stating that the court is constitutionally limited to enforcing statutes as adopted by the legislature; it cannot create law).

[109] *Id.* The court quoted Chief Justice Marshall in discussing judicial restraint: "Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislature; or in other words to the will of the law." *Id.* (quoting Osborne v. Bank of United States, 22 U.S. (9 Wheat.) 738, 866 (1824)).

[110] 397 So. 2d at 875. Plaintiff brought a common law tort action for actual and punitive damages urging the court to adopt a public policy exception to the rule that an employment contract may be terminated at the will of either party. *Id.*

legislative power.[111] In conclusion, the court emphasized that an exception to the employment at will rule was for the exclusive consideration of the legislature and any amendment to the Workmen's Compensation Law must be made by that department.[112]

The decision in the instant case is an exercise in judicial restraint in which the court declared that it could not overstep its constitutional boundaries to create a progressive social policy exception to the employment at will rule.[113] Although the rule became firmly established at common law when freedom to contract was believed to be essential for the growth of industry in America,[114] it has been severely criticized when used to coerce employees or deny them their legal rights.[115] Current law in some jurisdictions[116] has limited termination rights in an attempt to balance the interests of the employer in running his business, of the employee in continuing his employment, and of the public in having the rights of both the employer and the employee protected.[117] Other jurisdictions,[118] including Mississippi, which liberally interpret the employment at will rule and allow dismissal for any reason, do not balance these interests, but subordinate the employee's rights and the public's rights in favor of the employer.[119]

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[111] *Id.* at 876-77. The court explained that because problems and complaints of society have become excessively burdensome, requests are often made of the judiciary to usurp legislative power to remedy those ills. *Id.* at 877. In Hammer v. Yazoo Delta Lumber Co., 100 Miss. 349, 56 So. 466 (1911), the court stated that the judicial department's role is not to create remedies:

> The courts have no right to add anything or take anything from a statute, where the language is plain and unambiguous. To do so would be intrenching upon the power of the legislature. Neither have the courts the authority to write into the statute something which the legislature did not write therein, nor can they ingraft upon it any exception not done by the lawmaking department of the government. Whenever the judiciary shall undertake to violate these rules . . . then it is guilty of usurpation in its most obnoxious form; and the courts dare not do this lest they destroy their own usefulness and power.

Id. at 417, 56 So. at 490.

[112] 397 So. 2d at 877; *see* Moore v. Grillis, 205 Miss. 865, 888, 39 So. 2d 505, 509 (1949) (necessity of a law is to be decided by the legislature). Not all commentators agree that the hands of the court should be tied when legislative indifference exists toward critical public policy issues deserving immediate attention. For discussions of the judicial branch in the role of reformer, see Friedmann, *Legal Philosophy and Judicial Lawmaking,* 61 COLUM. L. REV. 821 (1961); Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts,* 44 TEX. L. REV. 1254 (1966); Peck, *The Role of the Courts and Legislatures in the Reform of Tort Law,* 48 MINN. L. REV. 265 (1963).

[113] *See* notes 104 through 112 and accompanying text *supra.*

[114] *See* notes 20, 21 and accompanying text *supra.*

[115] *See* note 49 *supra.* Professor Blumrosen explains that the shift in judicial attitude is based upon a change in the expectations of the parties to the employment relationship. While in the past both employees and employers expected courts to cater to entrepreneurs due to the industrial expansion, they now expect fair dealing, proof before discipline, and uniform enforcement of reasonable rules. Both parties recognize that these expectations cannot be protected by a presumption that employment contracts are terminable at will. Blumrosen, *supra* note 49, at 432-33.

[116] *See, e.g.,* Petermann v. Teamsters Local 396, 344 P.2d at 27 (providing cause of action for employee discharged for refusing to commit perjury on employer's behalf); Frampton v. Central Ind. Gas Co., 297 N.E.2d at 428 (providing cause of action for em-

In an emerging trend, courts have recognized that since workers' compensation laws were enacted to provide remedies for injured employees, vindictive employers could undermine the law by threatening discharge for an employee's pursuit of a claim.[120] The employee whose common law claim for injury has been supplanted by the act[121] will be forced to choose between seeking compensation under the act or retaining his employment.[122] As a result, a decision by the employee to continue employment without incident will effectively relieve the employer of the duty expressly placed upon him by the legislature.[123] In

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ployee discharged for asserting rights under the workers' compensation law); Monge v. Beebe Rubber Co., 316 A.2d at 551 (providing cause of action for employee discharged for refusing to date her foreman); Nees v. Hocks, 536 P.2d at 516 (providing cause of action for employee discharged for serving jury duty).

[117] *See* note 57 *supra.*

[118] *See, e.g.,* Mallard v. Boring, 182 Cal. App. 2d 390, 6 Cal. Rptr. 171, 174 (Dist. Ct. App. 1960) (allowing discharge of employee because he reported for jury duty); Geary v. United States Steel Corp., 456 Pa. 171, 319 A.2d 174, 180 (1974) (allowing discharge when employee reported product was defective); Raley v. Darling Shop, 216 S.C. 536, 59 S.E.2d 148, 149 (1950) (allowing discharge of employee who asserted rights under the workers' compensation act).

[119] The court in Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549, 551 (1974) recognized that the interest of the employee in maintaining his employment and interests of the public can outweigh the employer's absolute right to discharge.

The ultimate issue that must be resolved by the court in each jurisdiction is whether the legislature intended to provide a remedy for interference with employees' rights under the state's workmen's compensation law. *See* J. SUTHERLAND, *supra* note 70, § 55.03-.04 (in the interpretation of a statute enacted for the benefit of a class, courts must determine if legislative intent was to provide a private remedy).

[120] *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978). "[T]he legislature enacted the workmen's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act." *Id.*

[121] *See* note 69 *supra.*

[122] *See* Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978) (discussing options of employee).

[123] Frampton v. Central Ind. Gas Co., 297 N.E.2d at 427; Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978).

all states that have reached this conclusion and have provided the employee with a cause of action for retaliatory discharge, important public policy considerations have been found to underlie the workers' compensation acts, thereby prohibiting the employer from escaping liability under the act.[124] Although the purpose of the Mississippi Workmen's Compensation Law, to provide benefits to injured workers, is identical to the purpose of acts in states which have allowed recovery,[125] the *Kelly* court found no inference of public policy that would prohibit an employee's discharge for pursuit of a claim.[126] Therefore, it logically followed that an employee who had been compensated under the act had no legal right to complain of his dismissal.[127]

By refusing to provide a cause of action to the employee discharged in the instant case, the court signified that, absent a statute, employees for an indefinite time in Mississippi may be terminated for any reason, including a malicious and vindictive one.[128] Furthermore, the decision encourages unethical employers to use the common law authority vested in the employment at will rule against his employees.[129] Once an employee realizes that he has no remedy if discharged in retaliation for asserting his rights under the workers' compensation law, he is unlikely to file a claim, preferring instead to retain his employment.[130]

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[124] *See* Frampton v. Central Ind. Gas Co., 297 N.E.2d at 427-28 (court determined threat of discharge to be a "device" under the Indiana Workmen's Compensation Law which prohibited any "device" that relieved employer of liability under the Act); Sventko v. Kroger Co., 245 N.W.2d at 154 (statute making consistent discharge of employees to avoid provisions of the act unlawful was indication of public policy of state); Brown v. Transcon Lines, 588 P.2d at 1090 (provided a remedy apart from any statute, but added that provision of the workers' compensation statute allowing wrongfully discharged employee to pursue his claim with the Bureau of Labor indicates public policy of the state).

[125] *See* notes 71, 72, 77, 82 and accompanying text *supra.*

[126] *See* notes 104 through 112 and accompanying text *supra.*

[127] *See* Martin v. Tapley, 360 So. 2d 708, 709 (Ala. 1978). The court stated that the workers' compensation law requires that the plaintiff, an employee at will, be compensated for his injuries sustained during his employment. Plaintiff was so compensated, and this satisfied whatever implied contractual duty the defendants owed him in regard to the workmen's compensation law. *Id.*

[128] *See* notes 5, 31, 32 and accompanying text *supra* (indicating that Mississippi adheres to the employment at will rule).

[129] *See* note 72 *supra.*

[130] Since workers' compensation has been substituted for employees' common law tort rights against employers for job-related injuries, an employee electing to retain his job rather than pursue a claim for fear of discharge will be left without a remedy, either common law or statutory. Kelsay v. Motorola, Inc., 74 Ill. 2d 172, 384 N.E.2d 353, 357 (1978).

Upholding retaliatory discharge opens the door to coercion, duress, and other unconscionable acts.[131] Additionally, it completely subordinates the legal right of the employee to obtain compensation under the Mississippi Workmen's Compensation Law to the right of the employer to run his business as he desires.[132] Protection is thereby provided to the employer, who usually enjoys a superior bargaining position, while the employee, who often relies upon his job for every necessity, is denied essential recourse when maliciously discharged.[133] This harsh result should be expeditiously acted upon by the legislature to protect the employee's right to seek workers' compensation for injuries without fear of discharge.[134] The Mississippi Workmen's Compensation Law must be amended to provide a civil action, allowing both compensatory and punitive damages for discrimination in any form against an employee pursuing a good faith claim or testifying in any proceeding under the act.[135]

Bob Baker

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[131] *See* note 72 *supra.*

[132] The common law rule that in an employment relationship for an indefinite time, either party may terminate at his pleasure, has been the rule governing the duration of employment relationships in Mississippi since 1858. Butler v. Smith & Tharpe, 35 Miss. 457, 464 (1858). Mississippi courts have recognized the harsh consequences that result to employees and the need for change. They are reluctant, however, to carve a judicial exception into the well-established rule in the absence of a finding that the legislature intended to prohibit employers from escaping provisions of the workers' compensation act by abusive use of the discharge power.

[133] *See* note 35 and accompanying text *supra.*

[134] After the *Kelly* decision was handed down in February, an effort was made in the Mississippi Legislature to suspend the rules in order to introduce legislation making it unlawful to terminate an employee for making a good faith claim under Mississippi's Workmen's Compensation Law. *See* H.R. Con. Res. 89, Miss. Leg., Reg. Sess., March 9, 1981; S. Con. Res. 549, Miss. Leg., Reg. Sess., February 24, 1981. The effort was not successful, however, and any legislative consideration of policy on this matter was forestalled.

[135] The Texas statute set out in part in note 82 *supra* should provide a working model for consideration by the Mississippi legislature. *See* notes 82 through 85 and accompanying text *supra.*

FEDERAL RULES OF CIVIL PROCEDURE—OFFERS OF JUDGMENT—PREVAILING DEFENDANTS ARE NOT WITHIN THE PURVIEW OF RULE 68

Plaintiff, Rosemary August, filed suit in the United States District Court for the Northern District of Illinois[1] against her former employer, Delta Air Lines, alleging violations[2] of Title VII of the Civil Rights Act of 1964.[3] Pursuant to rule 68 of the Federal Rules of Civil Procedure,[4] defendant made a pre-trial offer of judgment to the plaintiff in the amount of $450, including costs and attorney's fees.[5] Plain-

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[1] Delta Air Lines, Inc. v. August, 101 S. Ct. 1146, 1148 (1981).

[2] Plaintiff alleged that she was terminated from her employment by the defendant solely because of her race. *Id.*

[3] 42 U.S.C. § 2000e (1976 & Supp. III 1979).

[4] FED. R. CIV. P. 68 provides:

> At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against him for the money or property or to the effect specified in his offer, with costs then accrued. If within 10 days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon the clerk shall enter judgment. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order of judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than 10 days prior to the commencement of hearings to determine the amount or extent of liability.

The purpose of rule 68 is to "encourage settlements and avoid protracted litigation." 28 U.S.C. app. at 500 (1976) (Advisory Committee's Notes on rule 68). In *Delta Air Lines* the Supreme Court stated: "In all litigation, the adverse consequences of potential defeat provide both parties with an incentive to settle in advance of trial." 101 S. Ct. at 1150.

[5] August v. Delta Air Lines, Inc., 600 F.2d 699, 700 (7th Cir. 1979), *aff'd,* 100 S. Ct. 1146 (1981). The defendant's offer stated:

> Pursuant to Rule 68 of the Federal Rules of Civil Procedure, defendant hereby offers to allow judgment to be taken against it in this action, in the amount of $450 which shall include attorney's fees, together with costs accrued to date. This offer of judgment is made for the purposes specified in Rule 68, and is not to be construed either as an admission that the defendant is liable

tiff rejected the offer and the case proceeded to trial. At the conclusion of the trial, the court entered judgment in favor of the defendant,[6] but ordered each party to pay its own cost of litigation.[7] The defendant then filed a motion for costs incurred subsequent to the settlement offer.[8] The trial court denied the motion stating that the cost-shifting provisions of rule 68 were not controlling since defendant's offer was not made in good faith.[9] The United States Court of Appeals for the Seventh Circuit affirmed on the same ground.[10] On writ of certiorari, the United States Supreme Court, *held,* affirmed. Rule 68 does not apply where judgment is entered in favor of the defendant-offeror. *Delta Air Lines, Inc. v. August,* 101 S. Ct. 1146 (1981).

At common law the costs of litigation were never awarded to either party without specific statutory authority.[11] The taxing of costs in equity actions, however, has traditionally been within the discretion of

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in this action, or that the plaintiff has suffered any damage.

100 S. Ct. at 1148 n.2.

[6] *Id.* at 1148.

[7] *Id.* at 1148. The trial court exercised its discretion in awarding costs pursuant to rule 54(d) of the Federal Rules of Civil Procedure which states in relevant part: "Costs. Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." FED. R. CIV. P. 54(d).

[8] 101 S. Ct. at 1148. In defending the motion the defendant argued that rule 68 should be given effect regardless of the size of the offer. *Id.* at 1150 n.11. The defendant contended that small offers would provide an incentive for early settlement because the trial judge could not exercise his discretion to award costs to a non-prevailing plaintiff. *Id.* at 1150. The defendant further argued that rule 68 should apply because district judges were beginning to deny costs to prevailing defendants in more cases, thus increasing the likelihood that defendants could be in a better position by losing judgment for less than the offer, than by winning the judgment. *Id.* at 1151 nn.12 & 14.

[9] *Id.* at 1148.

[10] August v. Delta Air Lines, Inc., 600 F.2d 699, 702 (7th Cir. 1979), *aff'd,* 101 S. Ct. 1146 (1981). Speaking for the court of appeals, Judge Wood stated that "the Rule 68 offer of judgment of less than $500 before trial is not of such significance in the context of this case to justify serious consideration by the plaintiff." 600 F.2d at 701.

[11] *See, e.g., In re* Rule No. 37, 30 U.S. (5 Pet.) 724, 724 (1831) (Baldwin, J., concurring in part and dissenting in part) (costs not recoverable in any common law action whether real, personal, or mixed); Oehring v. Fox Typewriter Co., 266 F. 682, 683 (2d Cir. 1920) (costs, whether trial or appellate, are statutory creatures), *discussed in* Annot., 12 A.L.R. 718 (1921).

Lord Mansfield stated in Ingle v. Wordsworth, 97 Eng. Rep. 834 (K.B. 1762), that statutes awarding costs should be strictly construed, and, absent a statute, no costs should be awarded. *Id.* at 835. The earliest known statute which allowed costs to be awarded *eo nomine* was the Statute of Gloucester, 1275, 6 Edw. 1, c.1. For a discussion of English and early American history of costs, see Goodhart, *Costs,* 38 YALE L.J. 849, 851-54 (1929).

the court.[12] Equity courts have customarily denied costs to plaintiffs who recovered no more than the amount offered as a settlement,[13] and many states have passed statutes to that effect.[14] In 1938, the United States Supreme Court, pursuant to its rule-making powers granted by Congress,[15] followed suit by adopting rule 68 of the Federal Rules of Civil Procedure.[16] The rule provided that a party defending against a claim[17] could, at any time more than ten days before trial began, offer to allow judgment to be taken against him for money, property, or any other form of relief with costs then accrued. The claimant then had ten days to accept by serving written notice after which either party could file the offer, acceptance, and proof of service with the clerk, who would then enter judgment.[18] If the claimant did not accept the offer, it was considered withdrawn and was not admissible. If the claimant then did not obtain judgment more favorable than the offer, he was required to pay costs from the time of the offer.[19] Although the advisory committee's comment to the 1938 rule simply cited three similar state statutes without further illumination,[20] it became well settled that the purpose of the rule was to encourage settlements and avoid prolonged litigation.[21] Since 1938 rule 68 has been clarified by two amendments[22] and interpreted by commentary[23] and case law. During the first ten years of the rule's existence courts held that: (1) the offer should not be filed with the court, but served on the offeree in the manner provided by rule 5(b) of the Federal Rules of Civil Procedure;[24] (2) a tender at the time of trial does not suffice;[25] (3) plaintiffs may not make offers under the rule;[26] (4) offers made after a judgment of liability are valid if they are made at least ten days before the hearing to determine the extent of liability;[27] and (5) if the offer did not mention attorney's fees, none may be awarded if the offer is accepted.[28]

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[12] *See, e.g.*, Sprague v. Ticonic Bank, 307 U.S. 161, 164-65 (1939) (costs are historically part of equity jurisdiction of federal courts); Kansas City S. Ry. v. Guardian Trust Co., 281 U.S. 1, 9 (1929) (award of costs in equity is dependent upon circumstances of case).

[13] *See* Crutcher v. Joyce, 146 F.2d 518, 520 (10th Cir. 1945) (equity costs not necessarily awarded to party in final decree) (quoting McCloskey v. Bowden, 82 N.J. Eq. 410, 89 A. 528, 529 (Ch. 1914)).

[14] For three examples of early statutes, see note 20 *infra*.

[15] *See* 28 U.S.C. § 2072 (1976) (statutory authority of Supreme Court to prescribe rules of practice and procedure for federal district courts).

[16] FED. R. CIV. P. 68. Rule 68 has not been significantly changed since its enactment in 1938. The rule was amended once in 1948 and again in 1966. These amendments were technical clarifications rather than substantive alterations. *See* note 22 *infra*.

[17] *See* note 26 and accompanying text *infra*.

[18] *See* Bowles v. Schmitt, 170 F.2d 617, 620 (2d Cir. 1948) (rule 68 is one of two instances where clerk may enter judgment without action by judge or jury).

[19] FED. R. CIV. P. 68.

[20] *See* 28 U.S.C. app. at 499 (1976) (Advisory Committee's Notes on rule 68). The statutes cited by the committee were 2 MINN. STAT. § 9323 (1927), 4 MONT. REV. CODES ANN. § 9770 (1935), and N.Y.C.P.A. § 177 (1937). Aside from minor procedural differences, these three state statutes were identical to the federal rule. The Advisory Committee's Notes did imply that claims against the United States would be governed by rule 54(d), but no further explanation of the rule was offered. 28 U.S.C. app. at 499 (1976).

[21] *E.g.*, Greenwood v. Stevenson, 88 F.R.D. 225, 228 (D.R.I. 1980) (purpose of rule 68 is to encourage settlement and avoid protracted litigation); Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. 607, 610-11 (E.D.N.Y. 1974) (same); 7 J. MOORE, FED-

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ERAL PRACTICE ¶ 68.02 (2d ed. 1980) (same). *But cf.* Nabors v. Texas Co., 32 F. Supp. 91, 92 (W.D. La. 1940) (purpose of rule is to fix responsibility for costs).

[22] The first amendment, enacted in 1948, changed the third sentence to make it clear that evidence of an unaccepted offer was admissible in a proceeding to determine costs, but not admissible otherwise. The last sentence was deleted and two new sentences were added to make it clear that an unaccepted offer did not preclude subsequent offers. 28 U.S.C. app. at 499-500 (1976).

The 1966 amendment made it clear that a rule 68 offer could be made even after a trial on the issue of liability, so long as it was made not less than 10 days prior to the commencement of proceedings to determine the amount or extent of liability. *Id.* at 500.

[23] *E.g.*, 7 J. MOORE, FEDERAL PRACTICE ¶ ¶ 68.01 to 68.06 (2d ed. 1980 & Supp. 1980-81) (analysis of rule and citation to cases); Udall, *May Offers of Judgment Under Rule 68 Be Revoked Before Acceptance?*, 19 F.R.D. 401, 402-05 (revocation of offer before expiration of ten day period).

[24] *See* Nabors v. Texas Co., 32 F. Supp. 91, 92 (W.D. La. 1940) (parties wishing to offer judgment shall serve notice upon adverse party); *accord,* Tansey v., Transcontinental & W. Air, Inc., 97 F. Supp. 458, 459 (D.D.C. 1949) (improper to file offer of judgment in pleading as part of record). Rule 5(b) of the Federal Rules of Civil Procedure prescribes the manner of service upon a party or his attorney. FED. R. CIV. P. 5(b).

[25] FDIC v. Fruit Growers Serv. Co., 2 F.R.D. 131, 133 (E.D. Wash. 1941); *cf.* Home Ins. Co. v. Kirkevold, 160 F.2d 938, 941 (9th Cir. 1947) (omission in defendant's brief of offer made 10 days prior to trial was fatal in hearing to determine costs).

[26] *See* Larson v. General Motors Corp., 52 F. Supp. 286, 287 (S.D.N.Y. 1943) (rule 68 provisions are inapplicable to plaintiffs), *aff'd,* 148 F.2d 319 (2d Cir.), *cert. denied,* 326 U.S. 745 (1945); Dobie, *The Federal Rules of Civil Procedure,* 25 VA. L. REV. 261, 303 n.192 (1939) (same). *But see* C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3001, at 56 n.7 (1973) (rule 68 may apply to a plaintiff defending against a counterclaim).

[27] Cover v. Chicago Eye Shield Co., 136 F.2d 374, 375 (7th Cir.), *cert. denied,* 320 U.S. 749 (1943). This case was cited with approval by the Advisory Committee on Rules for Civil Procedure in formulating the 1946 amendment. *Report of Proposed Amendments to Rules of Civil Procedure for the District Courts of the United States,* 5 F.R.D. 433, 483 (1946). In 1966, the *Cover* rationale was incorporated into rule 68 by amendment. *See* note 22 *supra.*

[28] *See* Gamlen Chem. Co. v. Dacar Chem. Prods. Co., 5 F.R.D. 215, 216 (W.D. Pa. 1946) (court rejected subsequent application for attorney's fees because they were not mentioned in the offer or acceptance). The reasoning in *Gamlen* was rejected in Waters v. Heublein, Inc., 485 F. Supp. 110 (N.D. Cal. 1979). The *Waters* court pointed out the

Since 1949, relatively few cases have analyzed rule 68.[29] These cases have nevertheless provided guidelines for interpreting the rule. For instance, an offer to compromise made without the formality of rule 68 is not an offer of judgment within the meaning of the rule.[30] The ten-day period of acceptance cannot be extended by the court,[31] and, once an offer has been made, it is not retractable.[32] For purposes of the rule, trial begins when the trial judge calls the proceedings to order and actually commences to hear the case.[33] Agreement in the contractual sense is necessary before there is a binding rule 68 offer.[34] An award of costs is not mandatory when the party refusing the offer is

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inappropriateness of the *Gamlen* approach where the plaintiff rejects an offer and then recovers less than the offer. 485 F. Supp. at 115. The *Waters* court concluded, however, that since the pertinent statutory fees provision for a Title VII case "authorized the award of fees *as part of costs* . . . then the defendant's offer for costs then accrued must be construed as including fees." 485 F. Supp. at 115. *Contra,* Cruz v. Pacific Am. Ins. Corp., 337 F.2d 746, 748-49 (9th Cir. 1964) (the words "necessary costs expended" or "costs accrued" did not by themselves, refer to attorney's fees, as their award was discretionary); Greenwood v. Stevenson, 88 F.R.D. 225, 232 (D.R.I. 1980) (court recognized *Waters* as persuasive, but held that defendant's offer, which included accrued costs, did not include attorney's fees because the offer was not binding).

At least one commentator in favor of increased use of the rule admitted that it should be subordinate to the legislative objective of encouraging civil rights litigation by allowing attorney's fees:

> [S]hifting the attorneys' fees to a defendant, or merely denying them to a plaintiff, has a chilling effect on the very litigation which Congress sought to encourage . . . . It is difficult to support the proposition that the purpose of rule 68, encouraging settlements, should outweigh the congressional purpose embodied in the Civil Rights Attorneys' [*sic*] Fees Awards Act of encouraging the vindication of civil rights.

1978 DUKE L.J. 889, 901.

[29] Possible explanations offered for this situation are that: (1) costs saved by use of the rule have been modest; and (2) practitioners are simply unaware of the rule. 1978 DUKE L.J. at 889-90.

[30] Maguire v. Federal Crop Ins. Corp., 181 F.2d 320, 322 (5th Cir. 1950).

[31] *See* Staffend v. Lake Cent. Airlines, Inc., 47 F.R.D. 218, 220 (N.D. Ohio 1969) (plaintiff's motion to hold offer of judgment in abeyance rejected on grounds that to do so would diminish rule's usefulness); *cf.* Twin City Constr. Co. v. Cantor, 22 Ariz. App. 133, 524 P.2d 967, 969 (1974) (court reached a similar conclusion interpreting state offer of judgment rule).

[32] *See* Udall, *supra* note 23, at 406 (drafters of federal rules did not intend offers to be retractable). Two state courts have concluded that offers under state counterparts to FED. R. CIV. P. 68 are not retractable during the 10-day period required by statute. Mubi v. Broomfield, 108 Ariz. 39, 492 P.2d 700, 702 (1972); Deck v. Chautauqua County Patrons' Fire Relief Ass'n, 73 Misc. 2d 1048, 343 N.Y.S.2d 855, 863 (Sup. Ct. 1973).

[33] Greenwood v. Stevenson, 88 F.R.D. 225, 229 (D.R.I. 1980).

[34] *Id.* at 229-30.

a class representative.[35]

The issue of whether rule 68 applied when the offeree actually lost the case was first presented in 1974 in *Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc.*[36] Plaintiff filed suit alleging patent infringement, and, before trial, pursuant to the provisions of rule 68, defendants tendered an offer of judgment consisting of twenty-five dollars and an agreement to abstain from the alleged infringement.[37] The offer was rejected and the case proceeded to trial where the plaintiff lost on the merits.[38] The trial court refused to award costs and attorney's fees to the defendants.[39] Defendants then filed a post-trial motion pursuant to the provisions of rule 68 seeking $1,000 in costs incurred subsequent to the offer of judgment.[40] In ruling on the motion, the court considered whether the rule 68 offer was appropriate, and, if so, whether the court had discretion in awarding costs to defendants.[41] The only issue raised was whether the offer had been made in good faith. The court held that, since the twenty-five dollar offer was an admission of infringement and an acknowledgement of plaintiff's rights, and since defendants' promise to cease infringement constituted valuable consideration, the offer was not made in bad faith, but was a proper offer of judgment in compliance with rule 68.[42] Having found the offer to be proper, the court then stated that although there was no case directly on point, the express language of the rule[43] and certain pertinent cases[44] mandated an award of costs to defendants.

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[35] Gay v. Waiters' Local 30, 86 F.R.D. 500, 504 (N.D. Cal. 1980).

[36] 63 F.R.D. 607 (E.D.N.Y. 1974).

[37] 63 F.R.D. at 608.

[38] Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 372 F. Supp. 88, 92, 95 (E.D.N.Y. 1974).

[39] *Id.* at 95. In refusing defendant's request for costs and attorney's fees, the court stated that the case was not "exceptional" and did not merit award of fees or costs as allowed by 35 U.S.C. § 285 (1952). 372 F. Supp. at 95. Since § 285 did not mention costs, the court apparently denied them pursuant to FED. R. CIV. P. 54(d) which provides that "costs shall be allowed as of course to the prevailing party unless the court otherwise directs." *See* Mr. Hanger, Inc. v. Cut Rate Plastic Hangers, Inc., 63 F.R.D. at 609 (same judge declaring that costs are not allowed pursuant to rule 54(d)).

[40] 63 F.R.D. at 609, 611.

[41] *Id.* at 610.

[42] *Id.*

[43] *Id.* at 609. Quoting part of rule 68, the court emphasized the words "must pay the costs." The court later stated that "[i]t cannot be questioned that the rule itself is couched in mandatory terms." *Id.* at 610.

[44] The court cited two federal district court cases. In Staffend v. Lake Cent. Airlines, 47 F.R.D. 218 (N.D. Ohio 1969), the court held that the extension of the 10-day period of acceptance would negate the sanction provided by rule 68. *Id.* at 219-20. If an

Although *Mr. Hanger* was the first case awarding costs to a prevailing defendant under rule 68, the court neither discussed its reasons for, nor acknowledged any issue in, its ruling. Nevertheless, the court implicitly held that a prevailing defendant was not precluded from an award of costs under the rule.[45] The court's holding that the award of costs to the offeror was mandatory under rule 68 has been followed not only by the federal courts[46] but also by several state courts interpreting state rules similar or identical to the federal rule.[47]

Four years after *Mr. Hanger*, a federal district court was confronted with two rule 68 motions in one case. In *Scheriff v. Beck*,[48] the plaintiff filed suit against two defendants, Wright and Beck, alleging violations of the plaintiff's civil rights[49] under section 1983 of title 42 of the United States Code.[50] Each defendant made a timely rule 68 offer of judgment. Both were rejected.[51] At trial Wright was vindicated and Beck lost a judgment of $500, which was $1,700 less than his offer of judgment.[52] The court awarded Wright his fees and costs.[53] The *Scheriff* court ignored the rule 68 offer and the decision in *Mr. Hanger*.[54] The court did consider Beck's rule 68 offer, but found it defective be-

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offer is served on an adversary pursuant to rule 5(b) and is rejected, the offeror may show proof of the offer at the proper time to save costs, provided recovery does not exceed tender. Nabors v. Texas Co., 32 F. Supp. 91, 92 (W.D. La. 1940). Additionally, the *Mr. Hanger* court cited cases in which courts expressly stated that utilization of rule 68 by a party would have enabled that party to avoid costs. 63 F.R.D. at 610-11.

[45] *See* notes 41 through 43 and accompanying text *supra*.

[46] *See, e.g.*, Scheriff v. Beck, 452 F. Supp. 1254, 1258 (D. Colo. 1978) (costs awarded to defendant-offeror in civil rights action); Dual v. Cleland, 79 F.R.D. 696, 697 (D.D.C. 1978) (plaintiff ordered to bear defendant-offeror's costs in Title VII suit). *But cf.* Gay v. Waiters' Local 30, 86 F.R.D. 500, 504 (N.D. Cal. 1980) (application of rule is not mandatory where plaintiff is a class representative).

[47] *E.g.*, Scott v. Robertson, 583 P.2d 188, 194 (Alaska 1978) (state rule mandates award of applicable costs to offeror); Santiesteban v. McGrath, 320 So. 2d 476, 478 (Fla. Dist. Ct. App. 1975) (same).

[48] 452 F. Supp. 1254 (D. Colo. 1978).

[49] Plaintiff alleged that defendants unlawfully arrested him, used excessive force, and made false statements to deputy sheriffs concerning the arrest and charges. *Id.* at 1256.

[50] 42 U.S.C. § 1983 (1976 & Supp. III 1979).

[51] 452 F. Supp. at 1256.

[52] *Id.*

[53] *Id.* at 1258.

[54] In considering its decision to award Wright his fees and costs, the court relied entirely on the Civil Rights Attorney's Fees Act of 1976, 42 U.S.C. § 1988 (1976), which provides, *inter alia*, that the court may allow a reasonable attorney's fee to the prevailing party in an action to enforce § 1983. Wright not only successfully defended against the plaintiff's claim, but was awarded $500 on a counterclaim. 452 F. Supp. at 1256-57.

cause it excluded attorney's fees.[55] The court stated that in a civil rights suit attorney's fees could be awarded at the discretion of the court.[56] Since rule 68 did not permit the offeror to choose which costs he was willing to pay, an offer which expressly precluded attorney's fees was void.[57]

The next year the court in *Waters v. Heublein, Inc.*[58] went a step further and held that in a civil rights case where the court could, at its discretion, award attorney's fees, a rule 68 offer which included costs accrued to date necessarily included attorney's fees.[59] The court further held that such an offer precluded an award of attorney's fees to a plaintiff where the judgment obtained was not greater than the offer.[60] Less than a year later another civil rights case held that a rule 68 offer of $20,001 with accrued costs did not necessarily include attorney's fees.[61] The court stated that it was not traditional to award attorney's fees as costs, and, even when there was statutory authority to award attorney's fees, they could not be considered the same kind of costs as those contemplated by rule 68.[62]

Since *Mr. Hanger's* implicit holding that prevailing defendants came under the purview of rule 68,[63] two other district courts have faced the issue and assumed that the holding in *Mr. Hanger* was correct. In *Dual v. Cleland*[64] a Title VII plaintiff lost on the merits and the court ordered each party to bear its own costs.[65] The defendant filed a motion seeking an award of costs as provided by rule 68.[66] The court cited *Mr. Hanger* and concluded that rule 68 allowed no discretion and, therefore, granted the motion.[67] In *Gay v. Waiters' Local 30*[68] the court assumed that prevailing defendants were not precluded from using rule 68, but nevertheless refused to make it applicable to named plaintiffs in a Title VII class action.[69]

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[55] 452 F. Supp. at 1260.

[56] *Id.* at 1257.

[57] *Id.* at 1260. For other cases which discuss whether attorney's fees should be included in the offer, see note 28 *supra*.

[58] 485 F. Supp. 110 (N.D. Cal. 1979).

[59] *Id.* at 114.

[60] *Id.* at 116.

[61] Greenwood v. Stevenson, 88 F.R.D. 225 (D.R.I. 1980). The defendants clearly intended to offer costs in addition to, rather than as part of, the $20,001. *Id.* at 232.

[62] *Id.* at 230, 232.

[63] *See* text accompanying note 45 *supra*.

[64] 79 F.R.D. 696 (D.D.C. 1978).

[65] *Id.* at 697. The court stated that although it had discretion under FED. R. CIV. P. 54(d) to award costs to the prevailing defendant, it should do so only after special circumstances were considered. 79 F.R.D. at 697. The court recognized the Supreme Court's holding in Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978), that "a [Title VII] plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless." 434 U.S. at 422. The district court found this reasoning applicable and refused to award costs to the defendant under rule 54(d). 79 F.R.D. at 697.

[66] 79 F.R.D. at 697.

In the instant case, the Court[70] reasoned that since the express language of rule 68[71] required that the plaintiff-offeree obtain judgment and since the objective of the rule was to decrease litigation by encouraging settlements,[72] the rule should not apply when the defendant obtains judgment.[73] Moreover, because the prevailing party is presumptively awarded costs,[74] a plaintiff-offeree risks little by declining a token offer of settlement.[75] The Court further reasoned that since the drafters of the rules did not intend for rule 68 to apply in cases in which the defendant prevailed,[76] the better interpretation was that the trial judge should have discretion to deny costs to the prevailing party.[77] Therefore, the Court concluded that defendants should not have an exclusive right to remove that discretion by making bad faith offers.[78]

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[67] *Id.*.

[68] 86 F.R.D. 500 (N.D. Cal. 1980).

[69] *Id.* at 503-04.

[70] The majority opinion was announced by Justice Stevens, who was joined by Justices Brennan, White, Marshall and Blackmun. 101 S. Ct. at 1148. Justice Powell filed a separate opinion concurring in the result but disagreeing with the Court's interpretation of rule 68. *Id.* at 1155. Justice Powell contended that in light of Title VII's requirement that the plaintiff receive "a reasonable attorney's fee as part of the cost," 42 U.S.C. § 2000e-5(k) (1976), defendant's offer of $450 including attorney's fees and costs was inadequate with respect to rule 68. 101 S. Ct. at 1155. Justice Powell stated that if the defendant's offer had included attorney's fees to be determined by the trial court, then the defendant would have complied with rule 68 and would thus be entitled to costs. *Id.* at 1157.

[71] 101 S. Ct. at 1149-50. The express language referred to by the Court was "judgment obtained by the offeree" and "judgment . . . taken against [the defendant]." *Id.*

[72] *Id.* at 1150; *see* Maguire v. Federal Crop Ins. Corp., 9 F.R.D. 240, 242 (W.D. La. 1948) (purpose of rule 68 is to encourage settlements and avoid extended litigation).

[73] 101 S. Ct. at 1150. The Court further reasoned that since a prevailing defendant could not utilize rule 68 and since an unreasonable offer would serve no purpose, then it was unnecessary to read a reasonableness requirement into the rule. *Id.* at 1151-52.

The Court declared that its decision was compelled by, and consistent with, the history of the rule. *Id.* at 1154-55. The reasons set forth by the Court were that: (1) the primary objective of the state statutes from which the rule was modeled was to "penalize prevailing plaintiffs who had rejected reasonable settlement offers without good cause," (2) plaintiffs prevailed in all the cases cited by the parties except one, and (3) there was no significant history of sham offers for the purpose of using the rule. *Id.* at 1153-55.

[74] *See* note 7 *supra.*

[75] 101 S. Ct. at 1150. According to the Court's reasoning, a plaintiff-offeree would consider it unlikely that he would be awarded costs in the event he lost the case. Therefore, from the plaintiff's perspective rule 68 would only guarantee a prevailing defendant that which he would probably obtain anyway. Based on this reasoning, a plaintiff-offeree would lack additional incentive to settle if the rule applied to prevailing defendants. *Id.* The defendants argued that there would be additional incentive because the plaintiff would forego the possibility that the trial judge would exercise his discretion under rule

In a chiding dissent,[79] Justice Rehnquist declared that since the Federal Rules of Civil Procedure provide that judgment has been obtained when the decree or order of the court can be appealed,[80] and since the plaintiff sought immediate appeal, then the plaintiff did receive judgment within the meaning of rule 68.[81] The dissent further stated that since the plaintiff in the instant case did not obtain judgment for more than the $450 that was offered, then the rule should

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54(d). *Id.* The defendants further asserted that this additional incentive is especially significant because "more district judges . . . are exercising the discretion granted by Rule 54(d) to deny costs to prevailing defendants." *Id.* at 1150 n.10. The Court rejected this reasoning and stated:

> We cannot reasonably conclude that the drafters of the Federal Rules intended on the one hand affirmatively to grant the district judge discretion to deny costs to the prevailing party under Rule 54(d) and then on the other hand to give defendants—and only defendants—the power to take away that discretion by performing a token act.

101 S. Ct. at 1151 (footnote omitted).

[76] *Id.* at 1151. Justice Rehnquist, however, stated that to allow prevailing defendants to utilize rule 68 would be consistent with the drafters' intent. Quoting the language of the original rule—"if the adverse party fails to obtain a judgment more favorable than that offered"—Justice Rehnquist stated that "[o]bviously, the event that 'triggered' the operation of the original Rule 68 was the failure of the plaintiff to obtain a judgment more favorable than that offered." *Id.* at 1160 (Rehnquist, J., dissenting). Justice Rehnquist then pointed out that there was no indication from the Advisory Committee Notes to the amendments that Congress intended to change the effect of the rule on prevailing defendants. *Id.*

[77] 101 S. Ct. at 1150; *see also* note 7 *supra.*

[78] 101 S. Ct. at 1150-51. Rule 68 does not apply to offers made by plaintiffs. *Id.; see* note 26 and accompanying text *supra.*

[79] Justice Rehnquist was joined by Chief Justice Burger and Justice Stewart. *Id.* at 1157. Their reasoning was echoed by Justice Powell. *Id.* at 1155. *See* note 70 *supra.*

[80] 101 S. Ct. at 1159 (Rehnquist, J., dissenting). As an example, Justice Rehnquist quoted the language of rule 54(d) of the Federal Rules of Civil Procedure which states that a judgment is a "decree and any order from which an appeal lies." He then reasoned that only by including "take nothing" judgments in the definition of "judgment" under rule 68, could the rule be consistent with the remaining rules. *Id.* at 1159; *cf.* BLACK'S LAW DICTIONARY 756 (5th ed. 1979) (final judgment defined as "[o]ne which puts an *end* to an action at law by declaring that the *plaintiff* either has *or has not* entitled himself to recover the remedy he sues for") (emphasis supplied).

[81] 101 S. Ct. at 1159.

apply and the defendant should be awarded costs.[82]

The majority based its holding primarily on the plain language of rule 68 by concluding that a lawyer would normally read the words "judgment obtained by the offeree" to mean a judgment in favor of the offeree.[83] The opinion, however, offered no support for this conclusion. The Court further concluded that the rule applied when a defendant offered to have "judgment taken against him."[84] A judgment taken against the defendant as a result of the defendant's offer was obviously favorable to the plaintiff. Therefore, if a case proceeded to trial, the rule would apply only if the judgment received by the plaintiff was favorable.[85]

The logic in the Court's conclusion is, indeed, elusive. When the defendant offers to allow judgment to be taken against him, his offer seeks an acceptance, not a trial. Of course, if the offer is accepted, there can be no doubt that the offeree has obtained a favorable judgment, and the clerk will enter judgment for the offeree in the amount of the offer.[86] If, however, the offer is not accepted within ten days, it is deemed withdrawn and the case proceeds to trial.[87] The judgment after trial and the offer of judgment before trial are not necessarily comparable.[88] Rule 68 specifically requires that no reference to the offer of judgment be made during the trial on the merits.[89] Justice Rehnquist's view that the plaintiff receives judgment, even if it is a "take nothing" judgment, appears to be correct.[90]

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[82] *Id.* at 1160.

[83] *Id.* at 1149-50; *see* note 71 and accompanying text *supra.*

[84] *Id.* at 1150.

[85] 101 S. Ct. at 1150. The Court is comparing the word "judgment" as it is used in two separate places in rule 68. In the first instance, the rule speaks of "an offer to allow judgment to be taken against [the defendant]." This "judgment" will be effective only if the plaintiff accepts the offer, in which case there will be no trial. The second instance in which rule 68 uses the word "judgment" is the one in which the rule refers to the "judgment finally obtained" at trial. The two uses of the word are mutually exclusive. *Id.*

[86] *See* note 18 and accompanying text *supra.*

[87] *See* notes 80, 81 and accompanying text *supra.*

[88] *See* Black's Law Dictionary 756-57 (5th ed. 1979) (distinguishing between consent or contractual judgments and those determined by law).

[89] Fed. R. Civ. P. 68 states in relevant part: "An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs."

[90] *See* notes 79 through 81 and accompanying text *supra.* Justice Rehnquist stated:

> [N]o policy argument will convince me that a plaintiff who has refused an offer under Rule 68 and then has a "take nothing" judgment entered against her should be in a better position than a similar plaintiff who has refused an offer under Rule 68 but obtained a judgment in her favor, although in a lesser

Second, the majority stated that its holding was consistent with the purpose of the rule.[91] Initially, the Court's reasoning is persuasive, but under closer scrutiny, it appears that one conclusion is proved, but another is drawn. In other words, allowing defendants to make bad faith offers in an attempt to claim costs under the rule would be contrary to the policy of avoiding litigation by encouraging settlement. An offeree would not be inclined to accept a bad faith offer of one penny if he believed that his prospects for recovery would be better by going to trial.[92] It is not necessarily true, however, that all defendants who prevail on the merits must have made bad faith offers.[93] The Court does not explain why it would be inconsistent with the purpose of the rule to allow a prevailing defendant who has made a reasonable offer to claim costs under the rule. The Court stated that defendants who make token offers and claim costs under rule 68 should not be allowed to deny the trial judge's discretion derived from rule 54(d).[94] Rule 54(d) is, however, preempted by rule 68 since the trial judge has a mandate from rule 68 and since the language of rule 54(d) contemplates preemption by other rules.[95]

Finally, the Court concluded that its decision was mandated by the history of rule 68.[96] The argument advanced by the dissent, however, is more convincing. The state rules from which the federal rule was modeled[97] had companion statutes which mandated the awarding of costs to prevailing defendants.[98] Therefore, the issue of awarding costs to prevailing defendants under the offer of judgment rules in those particular states would never arise. The Court again used reasoning for one conclusion to draw another when it stated that because de-

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amount than that which was offered pursuant to Rule 68.

101 S. Ct. at 1161 (Rehnquist, J., dissenting).

[91] 101 S. Ct. at 1150.

[92] *See id.* at 1150 n.11.

[93] For instance, see the offer outlined in the text accompanying notes 40 through 42 *supra.*

[94] 101 S. Ct. at 1150-51.

[95] *See id.* at 1161. Justice Rehnquist stated:

> Rule 54(d) itself contemplates the removal from the trial judge of the discretion of awarding costs when by its express terms it excepts situations where "express provision therefor is made . . . in these rules." It cannot be doubted that the mandatory language of Rule 68 is as clear a case of "express provision" as could be imagined.

Id. (Rehnquist, J., dissenting).

[96] *Id.* at 1152; *see* notes 73 and 75 *supra.*

[97] *See* note 20 *supra.*

[98] 101 S. Ct. at 1160-61 (Rehnquist, J., dissenting).

fense lawyers had not made a practice of making nominal offers under rule 68, it followed that they must have interpreted the rule as did the Court.[99] This proves, if anything, that defense lawyers simply overlooked the rule or were unaware of it. This is the logical conclusion since the rule was untested with regard to prevailing defendants; there would be nothing to lose by making such an offer.[100] The Court pointed out that the first case in which a prevailing defendant sought costs under rule 68 was in 1974.[101] In fact, there have been few cases litigated on the rule at all.[102]

Justice Powell's reasoning[103] that in cases where attorney's fees may be awarded, they must be considered part of the costs,[104] is very convincing. Rule 68 requires that the offeror include fees up to the date of the offer.[105] Since it would be impossible for the offeror to know with any certainty how much the court would allow as attorney's fees, the offer should provide for the award of attorney's fees by the court.[106]

The Court's use of the terms "meaningless act" and "sham offers"[107] merits comment. A defendant who believes himself to be liable to some degree is certainly in a position to make a "sham" offer by offering much less than he believes he owes. A defendant who does not believe himself to be liable at all, however, does not share that position. It seems anomalous that a defendant who believes himself to be blameless could be considered unreasonable because, rather than litigate, he offers victory to the plaintiff.[108] This holds true regardless of the amount of the offer.[109] Since the defendant believes that he will ultimately prevail, any amount he offers is more than he believes he owes. Arguably, no standard could be developed to determine what constitutes an unreasonable offer coming from one who believes he has done nothing wrong.

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[99] *Id.* at 1154.

[100] For other possible explanations, see note 29 *supra.*

[101] 101 S. Ct. at 1154 n.27.

[102] *See* note 29 and accompanying text *supra.*

[103] 101 S. Ct. at 1155-57 (Powell, J., concurring).

[104] *Id.* at 1155; *see, e.g.,* Scheriff v. Beck, 452 F. Supp. 1254, 1260 (D. Colo. 1978) (attorney's fees are costs and must be included if court has discretion).

[105] FED. R. CIV. P. 68 states that the offer must be made "with costs then accrued."

[106] 101 S. Ct. at 1157.

[107] *Id.* at 1151.

[108] A possible explanation for a defendant's offering to allow judgment to be taken against him, even though he believes that he will win the suit, is that in the vast majority of cases prevailing defendants are not awarded attorney's fees. *See* note 65 *supra.* It would be to the defendant's advantage to make an offer of $100, because his attorney's fees are certain to exceed that amount. If the defendant believes himself to be innocent of the charges made in the suit, it is difficult to understand how the $100 offer can be characterized as one made in "bad faith."

[109] *See* text accompanying notes 41 and 42 *supra.*

The impact of the instant case should be minimal since, in the forty-three year history of the rule, there have been only four cases[110] to which it would apply. Nonetheless, the Court's disposition of the issue appears to be incorrect and should be modified.

Jess H. Dickinson

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[110] *See* notes 1, 36, 64, 68 and accompanying text *supra.*

EVIDENCE—ATTORNEY-CLIENT PRIVILEGE—REJECTION OF THE CONTROL GROUP TEST AS APPLIED TO THE ATTORNEY-CLIENT PRIVILEGE INVOLVING A CORPORATE CLIENT

The United States brought an action in the Federal District Court for the Western District of Michigan, seeking to enforce an Internal Revenue Summons.[1] The summons required defendant Upjohn Company[2] to deliver, *inter alia,* certain questionnaires obtained in an internal investigation conducted by in-house counsel.[3] Upjohn had refused to comply with the summons, contending that the information was shielded from discovery by the attorney-client privilege.[4] The district

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[1] The summons was issued pursuant to I.R.C. § 7602.

[2] The Upjohn Company is an international pharmaceutical corporation. Also named as defendant was Gerard Thomas, who was the vice-president, secretary, and in-house counsel for the company. Upjohn Co. v. United States, 101 S. Ct. 677, 681 (1981).

[3] *Id.* at 682. The internal investigation was initiated by Gerard Thomas when Upjohn learned that payments might have been made to foreign government officials in an attempt to obtain government contracts. The investigation consisted, in part, of the distribution of questionnaires to foreign managerial personnel. Responses to the questionnaires were made at the request of Upjohn's chairman, were to be returned directly to Thomas, and were to be treated confidentially. Upjohn made a voluntary report to the Internal Revenue Service concerning the questionable payments, and, during an Internal Revenue Service investigation triggered by Upjohn's voluntary disclosures, the Internal Revenue Service issued a summons demanding production of the questionnaires, notes, and memoranda generated by Upjohn's internal investigation. *Id.* at 681-82.

[4] Upjohn also asserted that the information sought by the Internal Revenue Service was protected from discovery because it constituted the work product of the attorney. *Id.* at 682.

The work product doctrine was established in Hickman v. Taylor, 329 U.S. 495 (1947). In *Hickman,* the United States Supreme Court concluded that materials prepared by an attorney in anticipation of litigation were immune from discovery. *Id.* at 510. The work product doctrine could be defeated, however, upon a showing of necessity or undue hadship by the party seeking discovery. *Id.* at 511. The Court thus created a qualified immunity from discovery for materials such as private memoranda, written statements of witnesses, and mental impressions or personal recollections prepared or formed by an attorney in anticipation of future legal action. The Court justified the creation of the work product doctrine by asserting that in order to maintain our adversary legal system, the private files of an attorney must, except in unusual circumstances, be free from the inspection of opposing counsel. *Id.* at 510-11.

In the instant case, the district court concluded that the work product doctrine did not apply because the government had shown the requisite need and undue hardship. 101 S. Ct. at 682, 688. The Court of Appeals for the Sixth Circuit found that the work product doctrine was not applicable to IRS summonses. United States v. Upjohn Co., 600 F.2d 1223, 1228 n.13 (6th Cir. 1979), *rev'd,* 101 S. Ct. 677 (1981). The Supreme Court

court concluded that the attorney-client privilege had been waived and ordered Upjohn to produce the documents.[5] The court of appeals rejected the finding of waiver,[6] adopted the control group test,[7] and remanded for a determination of whether, under that test, the attorney-client privilege extended to the employees in question.[8] On writ of certiorari, the United States Supreme Court, *held,* reversed and remanded. The control group test should not be used to determine if a communication between an attorney and a corporate client is privileged; rather, the existence of the privilege should be determined on a case-by-case basis. *Upjohn Co. v. United States,* 101 S. Ct. 677 (1981).

The attorney-client privilege is the oldest communicative privilege known;[9] it has been used since the late sixteenth century.[10] The benefit of the privilege originally inured to the counselor and protected both his honor and the oath of his office.[11] By the late eighteenth century, however, the emphasis shifted to the protection of the client.[12] The modern rationale for use of the attorney-client privilege is that it pro-

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reversed, finding nothing in the legislative history of IRS summons provisions that suggested the doctrine should not be applied and concluding that the policy considerations that led to the establishment of the doctrine are equally applicable when an administrative summons is involved. 101 S. Ct. at 686-87.

[5] 101 S. Ct. at 682.

[6] The court of appeals found that Upjohn's voluntary disclosure to the SEC waived the privilege only with respect to the facts actually disclosed. United States v. Upjohn Co., 600 F.2d 1223, 1227 n.12 (6th Cir. 1979), *rev'd.,* 101 S. Ct. 677 (1981).

[7] 600 F.2d at 1225; *see* notes 31 through 36 and accompanying text *infra.*

[8] 600 F.2d at 1227-28.

[9] *See* 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. ed. 1961) (privilege dates from reign of Elizabeth I). It has been contended that the attorney-client privilege has its roots in the ancient Roman law that a slave could not be forced to testify against his master. Radin, *The Privilege of Confidential Communication Between Lawyer and Client,* 16 CALIF. L. REV. 487, 487-88 (1928). Critics of this view argue that there is little proof for this theory and the better view is that Roman precedent had some influence on English practice, but was not its source. Gardner, *A Re-evaluation of the Attorney-Client Privilege* (pt. 1), 8 VILL. L. REV. 279, 290 (1963).

[10] *See, e.g.,* Kelway v. Kelway, 21 Eng. Rep. 47 (Ch. 1580) (plaintiff's solicitor may be examined only on issues not touching secrecy of title); Dennis v. Codrington, 21 Eng. Rep. 53 (Ch. 1580) (counsel shall not be made to testify regarding matters on which he has advised as counsel); Berd v. Lovelace, 21 Eng. Rep. 33 (Ch. 1577) (solicitor exempted from examination touching the cause).

Wigmore notes that the privilege could not have originated much earlier than the mid-sixteenth century, since compulsory testimony of witnesses was not used as a method of proof until the reign of Queen Elizabeth. J. WIGMORE, *supra* note 9, § 2290.

[11] J. WIGMORE, *supra* note 9, § 2290.

[12] *Id.* Wigmore suggests that the attorney-client privilege would have been repudiated if this shift had not occurred. *Id.*

motes full and free communication of all relevant facts by a client so his attorney may develop and dispense competent legal advice.[13] Since the use of the privilege often prevents important information from reaching the trier of fact, it is employed only when necessary to achieve its purpose of promoting disclosures.[14]

Unique problems have arisen in applying the attorney-client privilege to corporate clients. Early cases extended the privilege to corporations without regard to their unique legal characteristics.[15] *United States v. United Shoe Machinery Corp.*[16] is illustrative of this approach. In that case the court found that the privilege would be applicable if the information was supplied to an attorney by either an officer or employee of the corporation and the other requirements for invoking the privilege were met.[17] The general use and acceptance of this broad approach[18] was largely a result of the relative ease it offered in predicting when the privilege would be applicable and because it promoted the underlying policy of the privilege—encouraging full and honest disclosure of all relevant information between a client and his attorney.[19] Indiscriminate application of the privilege to corporations, however, appeared to conflict with the Supreme Court's opinion in *Hickman v. Taylor.*[20] In *Hickman,* the Court found that communications between corporate employees and the corporation's attorney were outside the scope of the privilege, because the employees were witnesses to the incident that gave rise to the litigation.[21]

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[13] *See* Trammel v. United States, 445 U.S. 40, 51 (1980) (privilege required to ensure competent legal advice); Fisher v. United States, 425 U.S. 391, 403 (1976) (privilege encourages full disclosure by client); United States v. Louisville & N.R.R., 236 U.S. 318, 336 (1915) (absence of privilege would deter seeking of professional assistance).

Some commentators have maintained, however, that the supposed benefits of privilege cannot be verified, and in order to determine the value of the privilege an analysis should be made comparing the frequency with which the privilege promotes disclosures with its detrimental effects on discovery. *See* Comment, *Attorney-Client Privilege for Corporate Clients: The Control Group Test,* 84 Harv. L. Rev. 424, 425 (1970) (cost-benefit analysis).

[14] *See* Fisher v. United States, 425 U.S. 391, 403 (1976) (privilege applies only when necessary to achieve purpose); United States v. Osborn, 561 F.2d 1334, 1339 (9th Cir. 1977) (same).

Wigmore suggests that the privilege should only be applied if the following conditions are met:

> (1) The communications must originate in a *confidence* that they will not be disclosed.
>
> (2) This element of *confidentiality must be essential* to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The *relation* must be one which in the opinion of the community ought to be sedulously *fostered.*
>
> (4) The *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation.

J. Wigmore, *supra* note 9, § 2285.

The attorney-client privilege has also been criticized for encouraging the guilty to take refuge in the law. 5 J. Bentham, Rationale of Judicial Evidence, 302-27 (1978).

[15] *E.g.,* United States v. Louisville & N.R.R., 236 U.S. 318, 336 (1915) (refusal to authorize the compulsory submission of company's correspondences); Schwimmer v. United States, 232 F.2d 855, 865 (8th Cir. 1956) (attorney-client privilege exists with respect to corporation). For an exhaustive listing of cases holding that the attorney-client privilege extends to corporations, see Radiant Burners, Inc. v. American Gas Ass'n, 320 F.2d 314, 319-20 n.7 (7th Cir. 1963).

[16] 89 F. Supp. 357 (D. Mass. 1950).

A direct challenge to the broad application of the privilege to corporate clients came in *Radiant Burners, Inc. v. American Gas Association.*[22] The lower court in that case found the attorney-client privilege to be similar to the privilege against self-incrimination, since each is personal in nature. The court further analogized that just as the privilege against self-incrimination may not be utilized by a corporation, neither should the attorney-client privilege be available to a corporation.[23] Furthermore, the court reasoned that since confidentiality of the communication is a requirement, and since confidentiality is impossible in the corporate setting, the privilege should not be extended to corporations.[24] The Court of Appeals for the Seventh Circuit reversed.[25] That court noted that there had been no previous challenge to the privilege's availability to a corporation[26] and broadly held that the attorney-client privilege could be utilized by a corporation. The court indicated that in certain situations the privilege would not be available, but explicitly declined to delineate those situations in which the privilege would apply.[27]

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[17] *Id.* at 359. The information must be communicated for the purpose of obtaining legal advice, in confidence, and without the presence of third persons. *See id.*

[18] *See, e.g.,* United States v. Aluminum Co. of Am., 193 F. Supp. 251, 252 (N.D.N.Y. 1960) (broad application of the attorney-client privilege to intracorporate communications); Zenith Radio Corp. v. Radio Corp. of Am., 121 F. Supp. 792, 794 (D. Del. 1954) (communication to patent attorney privileged); cases cited in note 15 *supra.*

[19] 2 J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE ¶ 503(h)[04], at 503-44 (1980).

[20] 329 U.S. 495 (1947).

[21] *Id.* at 508.

[22] 207 F. Supp. 771 (N.D. Ill. 1962), *rev'd,* 320 F.2d 314 (7th Cir.), *cert. denied,* 375 U.S. 929 (1963).

[23] 207 F. Supp. at 773.

[24] *Id.* at 775. The court also predicted that broad availability of the attorney-client privilege to corporations would lead to abuse of the privilege. *Id.*

[25] 320 F.2d 314, 324 (7th Cir. 1963), *cert. denied,* 375 U.S. 929 (1963).

[26] 320 F.2d at 319.

Since *Radiant Burners,* three tests have been developed to determine when the attorney-client privilege should be available to a corporation. In *City of Philadelphia v. Westinghouse Electric Corp.,*[28] the court considered and rejected *Radiant Burners'* holding that the privilege was unavailable to a corporation.[29] Considering the application of the privilege to a broad class of corporate employees to be prohibited by *Hickman v. Taylor,*[30] the court proceeded to develop its own test. In order for the privilege to apply, the court reasoned, the communication must have been made by a person "in a position to control or . . . take a substantial part in a decision . . . which the corporation may take upon the advice of the attorney."[31]

Acceptance of the control group test among courts was rapid and widespread,[32] since it seemed to offer a reasonable limitation on the availability of the privilege to corporations.[33] Nevertheless, critics of the control group test charged that the test was unrealistic in view of the complexities of corporate structure and irrational in limiting the privilege to corporate directors.[34] Furthermore, it was asserted that the control group test was unreliable as a predictor of when the privilege would be applicable[35] and did not, in fact, remove the opportunities for abuse of the privilege.[36]

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[27] *Id.* at 323-24. The court declined to establish guidelines for determining when the privilege would be applicable because of the variety of factual situations in which the issue could arise. *Id.* The court did state, however, that the privilege would not be available if a corporation sought to funnel its papers into the "custodial" care of an attorney to prevent disclosure. Likewise, the privilege would not be available if business or personal advice, rather than legal advice, was sought. *Id.* at 325.

[28] 210 F. Supp. 483 (E.D. Pa.), *mandamus and prohibition denied sub nom.* General Elec. Co. v. Kirkpatrick, 312 F.2d 742 (3d Cir. 1962), *cert. denied,* 372 U.S. 943 (1963).

[29] 210 F. Supp. at 484. The court found the arguments for denying the privilege to corporations to be logically sound, but considered the length of time in which the availability of the privilege had been unchallenged to be decisive. *Id.*

[30] 329 U.S. 495 (1947); *see* text accompanying notes 20 and 21 *supra.*

[31] 210 F. Supp. at 485. The court refused to base the test on factors such as rank or title because the duties associated with these labels vary within each corporation. *Id.*

[32] *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3d Cir. 1979) (adoption of control group test); Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co., 68 F.R.D. 397, 400 (E.D. Va. 1975) (same); Congoleum Indus., Inc. v. GAF Corp., 49 F.R.D. 82, 84 (E.D. Pa. 1969) (same), *aff'd mem.,* 478 F.2d 1398 (3d Cir. 1973). It should be noted that the Fifth Circuit employed the control group test as a guideline in a case where the application of the attorney-client privilege was not at issue. Potashnick v. Port City Constr. Co., 609 F.2d 1101, 1119 n.12 (5th Cir. 1980).

[33] *See* Comment, *supra* note 13, at 424 (endorsing adoption of control group test). The use of the control group test became so prevalent that it led the drafters of the Proposed Federal Rules of Evidence to identify the control group test as the prevailing standard. J. WEINSTEIN & M. BERGER, *supra* note 19, at 46.

[34] *See* Burham, *Confidentiality and the Corporate Lawyer: The Attorney-Client*

These criticisms prompted some courts to explore new avenues in determining who should be considered a client within the corporate framework.[37] The immediate outgrowth was the Seventh Circuit Court of Appeals' enunciation in *Harper & Row Publishers, Inc. v. Decker*[38] of the subject matter test. This test provided a privilege as long as the corporate employee made the communication at the direction of a corporate superior and the communication concerned matters within the scope of the employee's duties.[39] It was a significant movement toward broader coverage of corporate communications.[40] The effect of the new test was to provide a more practical approach to the problem of privileged communications analysis.[41]

Several courts followed the Seventh Circuit's lead in adopting the subject matter test.[42] The *Harper & Row* standard, however, was not

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Privilege and "Work Product" in Illinois, 56 ILL. B.J. 542, 545-47 (1968) (privilege should be extended to communications from all agents of the corporation).

[35] *See* Kobak, *The Uneven Application of the Attorney-Client Privilege to Corporations in the Federal Courts*, 6 GA. L. REV. 339, 368 (1972) (control group test requires many questions to be resolved by judicial review).

[36] *See* 33 VAND. L. REV. 999, 1005 (1980) (all pertinent factors not reviewed because focus limited to position of communicant).

[37] *See* Comment, *The Corporate Attorney-Client Privilege: Alternatives to the Control Group Test*, 12 TEX. TECH. L. REV. 459, 464 (1981) (criticism of control group test caused response by courts).

[38] 423 F.2d 487 (7th Cir. 1970), *aff'd by an equally divided court*, 400 U.S. 348 (1971).

[39] 423 F.2d at 491-92; *cf.* D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 388 P.2d 700, 709-10, 36 Cal. Rptr. 468, 477-78 (1964) (test employed basically same as subject matter test).

[40] *See* Note, *Privileged Communication—Inroads on the "Control Group" Test in the Corporate Area*, 22 SYRACUSE L. REV. 759, 765 (1970-71) (subject matter test broader than control group test); 4 J. CORP. L. 226, 230 (1978) (same). *But see In re* Grand Jury Investigation, 599 F.2d 1224, 1237 (3rd Cir. 1979) (control group test broad enough).

[41] *See* Comment, *supra* note 37, at 465 (subject matter test practical approach).

[42] *See, e.g.*, United States v. AT&T, 86 F.R.D. 603, 620 (D.D.C. 1980) (rejecting control group test); *In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385 (D.D.C. 1978) (adopting test similar to subject matter test); Sylgab Steel & Wire Corp. v. Imoco-Gateway Corp., 62 F.R.D. 454, 456 (N.D. Ill. 1974) (privilege extends to directly concerned employees), *aff'd mem.*, 534 F.2d 330 (7th Cir. 1976). *But see* United States v. Amerada Hess Corp., 619 F.2d 980, 986 (3d Cir. 1980) (control test applied); *In re* Grand Jury Investigation, 599 F.2d 1224, 1235 (3d Cir. 1979) (control group test better predictor); United States v. IBM, 66 F.R.D. 154, 178 (S.D.N.Y. 1974) (control group test followed).

without its critics.[43] The major concern was the possibility of abuse inherent in the broad coverage of the test.[44] In response to this problem, some courts developed a modification of the subject matter test.[45]

The trend toward modification of the *Harper & Row* standard is best illustrated by the Eighth Circuit Court of Appeals decision in *Diversified Industries, Inc. v. Meredith.*[46] There the court sought a middle ground between the rigid control group analysis and the expansive subject matter test. After expressly rejecting the control group test and voicing concern about the possibilities of abuse under the subject matter test, a five-part test was created.[47] The court decided that the privilege would be applicable to corporations when the employee's communication was made in an attempt to obtain legal advice, when the communication was made at the request of a corporate superior, and when the corporate superior requested the communication so the corporation could obtain legal advice. In addition, the employee's communication must concern his corporate duties, and disclosure of the contents of the communication must be limited to those within the corporate framework who need to know the contents.[48] Thus, the modified subject matter test retained the expansive thrust and practical focus of *Harper & Row,* while seeking to curb the possibility of abuse by removing from the scope of the privilege communications of an employee who was merely a witness.[49]

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[43] *See* 23 Vand. L. Rev. 847, 853 (1970) (abuse possible). Much of the criticism of the subject matter test concerns the possibility of increasing the "zone of silence." This would prohibit effective discovery of relevant facts. *See* Simon, *The Attorney-Client Privilege as It Applies to Corporations,* 65 Yale L.J. 953, 955-56 (1956) (zone of silence increased). *But see* Borow, *The Attorney-Client Privilege and the Work Product Doctrine in the Corporate Context,* 36 Bus. Law. 1863, 1865 (1981) (truth would also surface under subject matter test).

[44] *See* Note, *The Corporate Attorney-Client Privilege in The Federal Courts,* 22 Cath. Law. 138, 150 (1976) (scope may be broadened beyond proper limits by subject matter test). *But See* Weinschel, *Corporate Employee Interviews and the Attorney-Client Privilege,* 12 B.C. Indus. & Com. L. Rev. 873, 877 (1971) ("*Harper & Row* stands as a lonely monument to reason in a sea of confusion").

[45] *See, e.g., In re* Ampicillin Antitrust Litigation, 81 F.R.D. 377, 385 (D.D.C. 1978) (privilege will be applied if the communication is necessary in deciding how to proceed with a particular legal problem); Perrington v. Bergen Brunswig Corp., 77 F.R.D. 455, 459 (N.D. Cal. 1978) (communication is privileged if the employee spoke at the direction of superiors and the communication dealt with matters concerning the employee's scope of employment); Burlington Indus., Inc. v. Exxon Corp., 65 F.R.D. 26, 38-39 (D. Md. 1974) (privilege extended to intra-corporate documents prepared by employees at the direction of supervisory personnel for the purpose of obtaining legal advice).

[46] 572 F.2d 606 (8th Cir. 1978). *See generally* 11 Conn. L. Rev. 94 *passim* (1978) (noting *Diversified Industries*).

[47] 572 F.2d at 609.

[48] *Id.* This five-part test is substantially similar to the criteria proposed by Judge Weinstein. *See* J. Weinstein & M. Burger, *supra* note 19, at 51 (criteria for applying attorney-client privilege to corporation). For an analysis of the judicial development of each part of the modified subject matter test, see 11 Conn. L. Rev. at 102-04.

In the instant case, the Court noted that the justification for the attorney-client privilege is that it encourages a client's complete and honest disclosure of pertinent information. Therefore, application of the control group test, which defeats the privilege by chilling the free flow of information between client and attorney, would be inappropriate.[50] Furthermore, after noting that the answers given on the questionnaires were made by the corporate employees at the direction of Upjohn's chairman, that the communications dealt with the employees' function within the corporation, and that the representations were made with the knowledge that they would be relied upon by those giving legal advice, the Court concluded that the attorney-client privilege shielded the documents sought by the Internal Revenue Service from discovery.[51] Finally, the Court stated that the Federal Rules of Evidence[52] require that the privilege be invoked upon a court's interpretation of the common law in view of reason and experience, and thus a determination of the future applicability of the privilege must be made on an ad hoc basis.[53]

In a concurring opinion, Chief Justice Burger stated that the value of the privilege depends upon the predictability of its application and opined that the Court should establish guidelines explaining which type of communications will be privileged, even though other classes of communications requiring the protection of the privilege may arise in the future.[54]

Upjohn offered the United States Supreme Court an opportunity to resolve a clear conflict between the circuits[55] concerning the application of the attorney-client privilege. While the Court obviously took advantage of the opportunity to the extent that it rejected the control group test as the standard to be applied in determining applicability of the privilege,[56] it failed to go a step further and define an appropriate approach.[57] The failure of the Court to establish a standard will, most likely, be criticized for sacrificing predictability and may lead to further litigation of the issue. Nevertheless, it appears that *Upjohn's* unequivocal rejection[58] of the control group test does provide courts with some definitive guidelines regarding the corporate attorney-client privilege. Clearly, the focus of the applicability question in future cases will be on the nature of the communication rather than the communicator's status within the corporate framework.

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[49] *Cf.* Hickman v. Taylor, 329 U.S. 495, 508 (1947) (mere witness outside scope of privilege).

[50] Upjohn Co. v. United States, 101 S. Ct. 677, 684-86 (1981).

[51] *Id.* at 685. Of the 86 Upjohn employees interviewed, seven had ended their employment with Upjohn at the time of the interview. Upjohn argued that their communications should be protected. The Court refused to address this issue because it had not been addressed by either of the lower courts. *Id.* at 685 n.3.

[52] FED. R. EVID. 501.

[53] 101 S. Ct. at 686.

[54] *Id.* at 689.

[55] At the time the United States Supreme Court granted certiorari in *Upjohn,* cases in the Third, Sixth and Tenth Circuits had adopted the control group test as a means for determining the applicability of the attorney-client privilege. In the Seventh Circuit, the subject matter test was the standard used, and in the Eighth Circuit the modified subject

Commentators have suggested several steps which corporate counsel should take in their attempts to ensure the application of the privilege after *Upjohn.*[59] First, all investigations should be directed by the corporate counsel in his capacity as legal advisor and in anticipation of litigation.[60] Furthermore, the confidentiality of the communications should be maintained and clearly defined,[61] and the communication should concern the communicator's corporate duties.[62]

While it is arguable that the modified subject matter test is the most reasoned approach to the applicability question and should have been adopted by the Supreme Court, it is interesting to note that the Court specifically relied on three of the five criteria of the modified subject matter test as a basis for its decision.[63] Since the corporate attorney is concerned with having the privilege at his disposal when it is needed, satisfaction of all of the criteria of the modified subject matter test seems to be the safest way to ensure that the attorney-client privilege will be available to the corporate client.

Bruce M. Kuehnle, Jr.

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matter test had been adopted.

[56] Upjohn Co. v. United States, 101 S. Ct. at 686; *see* note 50 and accompanying text *supra.*

[57] 101 S. Ct. at 686.

[58] *Id.*

[59] *See* Miller, *The Corporate Attorney-Client Privilege After Upjohn Co. v. U.S.*, L.A. Daily J. Rep., Mar. 13, 1981 (Supp.), at 8, col. 2.

[60] *Id.* at 8-9.

[61] *Id.* at 9.

[62] Scheibla, *Attorney-Client Privilege, The Upjohn Case Leaves Basic Issues Unresolved,* BARRON'S, Feb. 16, 1981, at 11, col. 1.

[63] *See* text accompanying note 51 *supra.*

WORKERS' COMPENSATION—EMPLOYER IMMUNITY—SUBCONTRACTOR IS EXEMPT FROM COMMON LAW LIABILITY FOR INJURIES TO GENERAL CONTRACTOR'S EMPLOYEE WHO IS DUAL EMPLOYEE AT THE TIME OF THE INJURY

Plaintiff, an employee of Bechtel Corporation, sued Bechtel's subcontractor,[1] Babcock & Wilcox Company, Inc., for injuries he sustained while doing electrical work under defendant's supervision. At the time of the accident,[2] plaintiff had been doing defendant's work for several weeks[3] and was under the supervision of one of defendant's engineers.[4] Defendant contended that it was exempt from common law tort liability[5] because plaintiff was a dual employee of both Bechtel and defendant.[6] The Circuit Court of Warren County granted defendant's motion for judgment notwithstanding the verdict.[7] On appeal to the Mississippi Supreme Court, *held,* affirmed. A subcontractor is immune from common law tort liability for injuries to the general contractor's employee where, at the time of the injury, the employee was a dual employee of both the general contractor and the subcontractor, workers' compensation being the employee's sole remedy. *Ray v. Babcock & Wilcox Co.,* 388 So. 2d 166 (Miss. 1980).

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[1] The plaintiff also filed suit against Mississippi Power & Light Company in whose generating plant the accident occurred. Before the trial, the court granted a nonsuit as to MP&L, on plaintiff's motion. Ray v. Babcock & Wilcox Co., 388 So. 2d 166, 167 (Miss. 1980).

[2] The plaintiff was on a ladder, working on a boiler front, when the ladder slipped on the oily floor, causing plaintiff to fall and be seriously injured. *Id.*

[3] Bechtel routinely sent one of its employee-electricians to defendant when needed, and backcharged defendant for the employee's time. *Id.*

[4] The facts do not indicate whether the engineer was actually present when plaintiff fell, but only that he was the person directing plaintiff in his work. *See id.* (discussion of engineer's supervisory role).

[5] Both Bechtel and defendant had secured compensation benefits for their employees. *Id.* Bechtel paid a compromise settlement to plaintiff in the amount of $35,000. *Id.* This type of payment is governed by MISS. CODE ANN. § 71-3-29 (1972), which provides in part:

> Rules of the commission shall govern compromise payments where the prescribed schedules are not applicable and which, in its discretion, may be made in cases where it is not possible to determine the exact extent of disability, as for example in certain injuries to the back or head. . . . Commutation and lump sum settlement payments shall be governed by rules of the commission, and shall not be made except when determined to be in the best interest of the injured worker or his dependents, the commission having final authority in such questions.

Plaintiff's acceptance of the settlement did not affect his right of action, if any, against defendant. *See* note 17 *infra*. *See generally* V. DUNN, MISSISSIPPI WORKMEN'S COMPENSATION §§ 311-318 (2d ed. 1967 & Supp. 1978) (procedural aspects and effect of compromise payments).

[6] Another issue in the case was whether or not the defendant had properly pled its defense of dual employment, which was raised by a "plea" and not as an affirmative defense. The courts at both the trial and appellate levels found it had been adequately pled. 388 So. 2d at 167.

When the industrial revolution caused a dramatic increase in death and disabling injuries due to employment, existing common law remedies were inadequate.[8] While the chances a worker would be seriously injured rose, the likelihood he would receive restitution actually decreased.[9] Consequently, workers' compensation acts were enacted[10] to provide relief for the injured employee and to shift the financial burden of his injuries to the ultimate beneficiaries of his work, the consuming public.[11]

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[7] The jury verdict for plaintiff was $412,500. *Id.*

[8] *See* 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION §§ 4.40, 4.50, 5.20 (1978) (description of judicial and legislative efforts to handle problem before compensation laws enacted); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 80, at 525-30 (4th ed. 1971) (discussion of common law principles relied upon for compensating employee injuries). *See generally* 2 H. MILLIS & R. MONTGOMERY, LABOR'S RISKS AND SOCIAL INSURANCE 187-234 (1938) (account of problems leading to enactment of compensation laws).

[9] 1 A. LARSON, *supra* note 8, § 4.30, at 26. At common law, employers had certain recognized duties to their employees. Chief among these were the duty to provide a safe workplace and the duty to provide safe tools. *See* 1 C. LABATT, COMMENTARIES ON THE LAW OF MASTER AND SERVANT 7-9 (1904) (principles of master's liability). Employees' remedies against employers declined as a result of an apparent policy decision by courts that fledgling industrial growth should not be hindered by the burden of compensating injured employees. *See* W. DODD, ADMINISTRATION OF WORKMEN'S COMPENSATION 7 (1936) (considering seeming inconsistency of fellow-servant doctrine with respondeat superior).

New common law defenses were developed to protect employers from liability. *See* 1 A. LARSON, *supra* note 8, § 4.30, at 25 (remedies of employee diminished). Contributory negligence was the first of these, barring an employee's claim against a negligent employer where the employee's own negligence played even a small part in his being injured. *Id.* at 27; 2 H. MILLIS & R. MONTGOMERY, *supra* note 8, at 191. This defense was soon joined by two others: the fellow-servant doctrine and assumption of the risk. 1 A. LARSON, *supra* note 8, § 4.30, at 25-26. Under the fellow-servant doctrine, an employer was not vicariously liable under respondeat superior for his employee's negligence where the injuries were to a fellow employee. *Id.* at 25. The assumption of the risk defense might be used in two situations: (1) where the employer was not negligent and the injury was due to a risk ordinary to the industry and (2) where the employer was negligent but the employee knew of the unsafe conditions and continued to work. 2 H. MILLIS & R. MONTGOMERY, *supra* note 8, at 190-91. In either case, a decision that the employee had assumed the risk of the ensuing injury barred his claim. *Id.* at 191. The effect of the availability of these three defenses was estimated to leave at least 83% of employment-related injuries totally uncompensated. 1 A. LARSON, *supra* note 8, § 4.30, at 27.

[10] Germany enacted the first workers' compensation statute in 1884. A. MILLUS & W. GENTILE, WORKERS' COMPENSATION LAW AND INSURANCE 5 (1976). In the United States, the first workers' compensation laws were passed in Washington and Kansas on

One theory underlying workers' compensation is that the employee's right to be compensated arises from an implied contract with his employer.[12] The more accepted theory is that the loss or injury of an employee in a work-related accident is a cost of engaging in that particular enterprise and should be passed along in the cost of the product.[13] Although individual workers' compensation acts vary,[14] they all involve the same compromise: the employer assumes liability for compensating his employee for work-related injuries regardless of fault, and, in return, the employee gives up his right to pursue any other remedy against his employer.[15]

All acts permit the employee to retain his common law rights with

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March 14, 1911, and the first to go into effect was Wisconsin's on May 3, 1911. U.S. Bureau of Labor Standards, Dep't of Labor, Labor Law Series No. 10, Summary of State Workmen's Compensation Laws 1 (1970). Mississippi was the last state to enact a workers' compensation law, with its act taking effect January 1, 1949. 1 A. Larson, *supra* note 8, § 5.30, at 39.

[11] *See, e.g.*, Frohlick Crane Serv., Inc. v. Mack, 182 Colo. 34, 510 P.2d 891, 892 (1973) (primary purpose of compensation act is to afford relief to employees for job-related injuries, regardless of fault); Milwaukee v. Miller, 154 Wis. 652, 144 N.W. 188, 194-95 (1913) (purpose of law is to fulfill moral duty of public to compensate injured workers as cost of production). *See generally* Larson, *The Nature and Origins of Workmen's Compensation*, 37 Cornell L.Q. 206 (1952) (background and philosophy of workers' compensation).

[12] *See, e.g.*, State Indus. Comm'n v. Nordenholt Corp., 259 U.S. 263, 271 (1921) (compensation for injuries implied in employment contract); Post v. Burger & Gohlke, 216 N.Y. 544, 111 N.E. 351, 353-54, 153 N.Y.S. 505, 506-07 (1915) (constructive contract between employer and employee is basis of liability).

[13] *See* Alaska Packers Ass'n v. Industrial Accident Comm'n, 294 U.S. 532, 541 (1935) (cost of compensation liability properly placed on business enterprise). *See generally* 1 W. Schneider, Workmen's Compensation Law § 1, at 1-7 (2d ed. 1932) (rationale of workers' compensation laws); *see also* Davis, *Workmen's Compensation—Using an Enterprise Theory of Employment to Determine Who is a Third Party Tort-Feasor,* 32 U. Pitt. L. Rev. 289, 293 (1971) (analysis of differing approaches to third-party claims in light of philosophy of workers' compensation).

[14] *Compare* Conn. Gen. Stat. Ann. §§ 31-275, -284 (West 1972 & Supp. 1981) (all employers required to provide compensation coverage) *with* N.J. Stat. Ann. § 34:15-7 (Supp. 1980) (compensation coverage elective of employer and employee). For a summary and evaluation of state workers' compensation acts, see the Report of the National Commission on State Workmen's Compensation Laws (1972). *See generally* Chamber of Commerce of the United States, Analysis of Workers' Compensation Laws 3-41 (1980) (published annually).

[15] *See, e.g.*, Cal. Labor Code § 3600 (West Supp. 1980) (compensation liability exclusive); Kan. Stat. Ann. § 44-501 (1973) (obligations of employer and employee).

respect to bringing negligence actions against third parties, but there are considerable differences as to who these "third parties" are.[16] Many states, including Mississippi, have provisions which grant immunity from common law liability only to the employer.[17] The natural result of these provisions is the creation of "upside-down" compensation cases, in which an employee is trying to avoid the coverage of a compensation act and an employer is seeking coverage in order to benefit from its exclusive remedy provision.[18] The question facing courts in these cases is which employer-related parties, if any, should be considered "employers" under the workers' compensation act.[19] Some courts have refused to grant immunity to any party other than the actual or principal employer.[20] Others have construed "employer" to include certain employment-related parties such as coemployees[21] or other employers on

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[16] *See, e.g.,* ARIZ. REV. STAT. ANN. § 23-1023(A) (1971) (employee may pursue common law remedy against third-party tortfeasor); IDAHO CODE §§ 72-211, -223 (1973) (law does not affect employees' rights against third parties). *See generally* McCoid, *The Third Person in the Compensation Picture: A Study of the Liabilities and Rights of Non-Employers,* 37 TEX. L. REV. 389, 393-94 (1959) (characteristic features of compensation acts). McCoid divides third-party provisions into four categories: (1) statutes recognizing a right of action against nonemployers; (2) statutes recognizing a right of action against nonemployers, but exempting coemployees from liability when the employer has secured compensation benefits; (3) statutes recognizing a right of action against persons who are not in the same employ; and (4) statutes making no provision with respect to third party liability. *Id.* at 403-04.

[17] *See, e.g.,* ARK. STAT. ANN. §§ 81-1304, -1340 (1976) (employee's remedies against third parties unaffected by employer's liability); FLA. STAT. ANN. § 440.39(1) (West Supp. 1981) (employee may accept compensation and pursue common law remedies); MASS. GEN. LAWS ANN. ch. 152, § 15 (West Supp. 1981) (employee's recovery from third party used to repay compensation benefits).

The relevant Mississippi statutes provide:

> The liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such injury or death . . . .

MISS. CODE ANN. § 71-3-9 (1972). The chapter continues:

> The acceptance of compensation benefits from or the making of a claim for compensation against an employer or insurer for the injury or death of an employee shall not affect the right of the employee or his dependents to sue any other party at law for such injury or death . . . .

Id. § 71-3-71 (1972). *See generally* 2A A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 72.10 (1976) (employer-only provisions discussed).

[18] *See* Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323, 325 (Miss. 1968) (quoting 1 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 26.10, at 452.11 (1965)) (prime contractor sued by subcontractor's employee); *cf.* McCluskey v. Thompson, 363 So. 2d 256, 258 (1978) (citing *Stubbs*) (coemployee immune from liability).

[19] *See generally* 2A A. LARSON, *supra* note 17, §§ 72.10-.50 (various approaches to interpreting immunity provisions).

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[20] *See, e.g.*, Trahan v. Travelers Ins. Co., 278 So. 2d 886, 889-90 (La. Ct. App. 1973) (executive or supervisory coemployee not immune); Lampada v. State Sand & Gravel Co., 58 Wis. 2d 315, 206 N.W.2d 138, 141 (1973) (same). *See generally* 2A A. LARSON, *supra* note 17, § 72.10, at 14-29 to -35 (discussion of provisions making only employer immune).

[21] *E.g.*, Miller v. Scott, 339 S.W.2d 941, 944 (Ky. 1960) (coemployee driving company-owned truck in the course of his employment held not a third party); McCluskey v. Thompson, 363 So. 2d 256, 264 (Miss. 1978) (common law liability of coemployee cannot coexist with compensation law). The trend is toward granting immunity to coemployees in states having third party provisions. 2A A. LARSON, *supra* note 17, § 72.20, at 14-36. Many states have accomplished this by amending their compensation statutes, sometimes in response to judicial decisions to the contrary. *See id.* at 103, 109 n.23 (Supp. 1980) (recent decisions extending immunity to coemployees).

In *McCluskey*, the Mississippi Supreme Court frankly adopted coemployee immunity, in full recognition that no such provision had been made by the legislature. 363 So. 2d at 259-64. Larson noted that the court in *McCluskey* concluded that suits against coemployees are so offensive that they must be barred by courts even though the legislature has apparently sanctioned them. 2A A. LARSON, *supra* note 17, § 72.20, at 109 (Supp. 1980). The court's reasoning in *McCluskey* has been sharply criticized. *See id.* (evaluation of *McCluskey*). Larson suggests that it would be preferable to argue that, in the compromise of rights, an employee also has a right to expect immunity from liability based on industrial accidents in which he is at fault. *See* 2A A. LARSON, *supra* note 17, § 72.20, at 14-39 (criticism of trend toward expanding immunity provision of compensations acts). Larson argues that this rationale for coemployee immunity is a weak one.

> If . . . an employee is injured by the negligence of a co-employee in the latter's operation of his automobile, the realistic question is whether the insurance carrier on the co-employee's automobile liability policy should enjoy a windfall, at the expense of the injured employee. . . . When the matter is viewed in this light, there seems to be little modern justification for extension of tort immunity beyond the employer [or statutory employer] himself.

Id. § 72.50, at 14-95.

An analysis favoring the grant of coemployee immunity in Mississippi, using a rationale similar to the one Larson describes, appears in Comment, *The Third Party Action—Expanding the Circle of Immunity: Coemployees,* 48 MISS. L.J. 87, 108-09 (1977). The commentator argues that coemployee liability is contrary to the basic premise of workers' compensation. The employing enterprise should bear the loss and should ultimately distribute such loss to its customers. *Id.* at 108. The risk of injury is inherent in the workplace, and thus this risk should be imposed on the employer. *Id.* at 109. It is further maintained that supervisory employees are often covered by the employer's own insurance policy; therefore, coemployee liability would render employer immunity meaningless. *Id.* In this comment, the argument for coemployee immunity proceeds on the assumption that the question had not been considered by the Mississippi courts. *See id.* at 95 (question of coemployee immunity not expressly decided). In *McCluskey,* however, the Mississippi Supreme Court claimed that coemployees had been extended immunity in Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323, 325 (Miss. 1968), decided nine years before the comment was published. *See* 363 So. 2d at 258 (basis for coemployee immua common project,[22] extending employer immunity to include them as well.

The Mississippi Supreme Court has considered this problem in primarily three contexts. The first arises out of the "statutory employer" or "contractor" provision[23] of the Mississippi Workmen's Compensation Act.[24] This provision, which allows a nonemployer to be held liable for compensation benefits, forms the sole exception to the Act's requirement that liability be based on the employment relationship.[25] The court, in *Mosley v. Jones,*[26] adopted the majority rule,[27] holding that evenhandedness required that statutory employers be considered

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nity). Since *McCluskey,* the court has expanded coemployee immunity to include supervisory personnel. *See* Brown v. Estess, 374 So. 2d 241, 243 (Miss. 1979) (general manager immune from employee's suit). In *Brown* the court reasoned that there is no distinction between a fellow employee and a corporate officer. *Id.* at 242-43.

[22] The Mississippi Supreme Court has expressly stated that this doctrine is not the law in Mississippi and that its implementation should be a legislative question. Index Drilling Co. v. Williams, 242 Miss. 775, 785-86, 137 So. 2d 525, 528-29 (1962). In *Index Drilling Co.,* the injured plaintiff was an employee of one of five corporations owned by two persons, with related activities in servicing oil drilling operations. *Id.* at 781, 137 So. 2d at 526. The plaintiff was injured while unloading a truck owned by Index Drilling Company, one of the five corporations, but not the corporation employing plaintiff. *Id.* at 781-82, 137 So. 2d at 526-27. The court held the plaintiff had the right to sue Index Drilling Company as a third party tortfeasor. *Id.* at 786, 137 So. 2d at 529.

[23] MISS. CODE ANN. § 71-3-7 (1972) provides in part:

> Every employer to whom this chapter applies shall be liable for and shall secure the payment to his employees of the compensation payable under its provisions.
>
> In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor, unless the subcontractor has secured such payment.

[24] MISS. CODE ANN. §§ 71-3-1 to -113 (1972 & Supp. 1980). For an evaluation of the strengths and weaknesses of the Mississippi Act in its early years, see Larson, *Workmen's Compensation in Mississippi: The First Five Years,* 25 MISS. L.J. 109 (1954), in which Larson ranked the Act as "one of the best compensation statutes in the country." *Id.* at 109.

[25] *See* Mills v. Barrett, 213 Miss. 171, 174-75, 56 So. 2d 485, 487 (1952) (purpose of provision is to prevent general contractor from relieving self of liability by employing subcontractors who are not financially responsible, thereby leaving employees unprotected).

[26] 224 Miss. 725, 80 So. 2d 819 (1955). *Mosley* involved the claim of a plastering subcontractor's employee against the general contractor. *Id.* at 731-32, 80 So. 2d at 820. The subcontractor had not secured compensation benefits for his employees, *id.* at 736, 80 So. 2d at 823, but the general contractor had secured such compensation. *Id.* at 734, 80 So. 2d at 822. Thus, since the facts were such that the general contractor could have been made liable for compensation benefits, the court reasoned that the general contractor should be immune from common law liability. *Id.* at 732, 736, 80 So. 2d at 821, 823.

[27] *See* 2A A. LARSON, *supra* note 17, § 72.31, at 14-47.

"employers" under the Act and be granted immunity from common law negligence actions by their subcontractor's employees.[28]

For a time, the court seemed determined to expand the circle of immunity no further.[29] In a series of cases, each of which asked the court to find an employer-employee relationship under the loaned-servant doctrine,[30] the court repeatedly refused to do so where the effect would be to bar the employee's common law suit.[31] In *Clark v. Luther*

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[28] 224 Miss. at 736, 80 So. 2d 823. The court previously had held statutory employers liable for compensation under the Act in Mills v. Barrett, 213 Miss. 171, 176-77, 56 So. 2d 485, 487-88 (1952) and Jackson v. Fly, 215 Miss. 303, 310, 60 So. 2d 782, 786 (1952), *modified*, 217 Miss. 129, 63 So. 2d 536 (1953) (motion to correct judgment sustained in part as to damage award).

[29] "[T]he Workmen's Compensation Act preserves a compensation claimant's right of action against 'any other party at law,' except the employer or insurer . . . . The present statutes confine immunity from tort liability to the claimant's employer." Index Drilling Co. v. Williams, 242 Miss. 775, 785-86, 137 So. 2d 525, 528-29 (1962).

[30] The loaned-servant doctrine is a common law doctrine used to impute vicarious tort liability to the borrowing employer. *See* 2A A. LARSON, *supra* note 17, § 48.10, at 8-317 to -319 (doctrine may be invoked when general employer lends employee to special employer). In Mississippi, the control test, whether or not the borrowing or special employer has the right to control the borrowed or special employee, has been determinative in loaned-servant cases. *See* Sawmill Constr. Co. v. Bright, 116 Miss 491, 500-01, 77 So. 316, 318 (1918) (employee who performed services under control of employer's subcontractor was loaned servant as to those acts); *cf.* Texas Co. v. Mills, 171 Miss. 231, 246-47, 156 So. 866, 869-70 (1934) (test of employment relation is right to control employee). The control test has also been used in compensation cases. *See* Runnels v. Burdine, 234 Miss. 272, 276-77, 106 So. 2d 49, 50-51 (1958) (employee barred from common law action against principal employer of borrowed employee). However, in Clark v. Luther McGill, Inc., 240 Miss. 509, 127 So. 2d 858 (1961), the common law test was supplemented by the requirement that there be a contract of hire, express or implied, between the loaned employee and the borrowing employer. *Id.* at 517, 127 So. 2d 861. One basis for this additional test was the fact that the definition of "employee" in the Mississippi Workmen's Compensation Act includes a contract of hire. *Id.* at 515, 127 So. 2d at 860. Another reason for the requirement was the recognition that the aims of the common law test differed from those of the Compensation Act. *Id.* at 517-18, 127 So. 2d at 861-62. At common law, the concern was vicarious liability, and, thus, who was in control of the employee was a relevant consideration. *Id.*, 127 So. 2d at 861-62. In the compensation cases, the question involved either who would pay compensation benefits or whether an employee's common law action was barred. Thus, the employee's consent to the employment became significant. *Id.*, 127 So. 2d at 861-62.

[31] *See, e.g.*, Index Drilling Co. v. Williams, 242 Miss. 775, 786, 137 So. 2d 525, 528-29 (1962) (employee of one corporate entity not loaned to other, although corporations had common owner); Clark v. Luther McGill, Inc., 240 Miss. 509, 520, 127 So. 2d 858, 862 (1961) (actual control of employee by subcontractor insufficient to find loaned employee status); *cf.* John Hancock Trucking Co. v. Walker, 243 Miss. 487, 496, 138 So. 2d 478, 481 (1962) (driver leased to subcontractor by general employer not loaned servant).

Where the loaned-servant doctrine was argued for purposes of bringing an employee

McGill, Inc.,[32] the court stated its requirements for finding a special employment relationship.[33] *Clark* was a negligence action involving the claim of a roughneck who was injured while assisting a hauling contractor engaged by his employer.[34] Rejecting the hauler's contention that, at the time the injury occurred, it was the roughneck's special employer[35] and, thus, immune from suit under the Workmen's Compensation Act,[36] the court found the evidence would fully justify the opposite conclusion.[37] To find the plaintiff was a loaned servant, the court stated, would require proof of a contract of hire,[38] express or implied, between plaintiff and defendant as well as proof that defendant had the right to control plaintiff's work.[39] Despite the fact that the court adopted a well-defined policy of permitting third-party suits against employers other than the principal employer,[40] the effect of this deci-

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under compensation coverage, however, the court took a more liberal view in finding the employment relationship. *See* Burnham Van Serv., Inc. v. Dependents of Moore, 250 Miss. 165, 185-86, 164 So. 2d 733, 740 (1964) (subcontractor was general employee's special employer and liable for compensation benefits). The liberal view also predominated where the employer sought to avoid compensation coverage by arguing that his employee was a loaned servant of another at the time of injury. *See* Rowell Equip. Co. v. McMullan, 241 Miss. 845, 852-53, 133 So. 2d 631, 633-34 (1961) (control by subcontractor was not ultimate control).

[32] 240 Miss. 509, 127 So. 2d 858 (1961).

[33] *Id.* at 515, 127 So. 2d at 860.

[34] *Id.* at 514-15, 127 So. 2d at 859. One of the hauler's employees, unknown to the plaintiff employee, had improperly bridled a 10-ton steel substructure that was to be moved. *Id.*, 127 So. 2d at 859. Thus, a guide chain, instead of the hoisting cable, bore the weight of the substructure. *Id.* at 515, 127 So. 2d at 859-60. Plaintiff offered assistance in loading the substructure and was told to sit on one end of it to balance it. *Id.* at 515, 127 So. 2d at 860. When the substructure was lifted, the chain broke and the entire load, together with the plaintiff, fell four or five feet to the ground, seriously injuring the plaintiff. *Id.*, 127 So. 2d at 859-60.

[35] *Id.* at 520, 127 So. 2d at 862; *see* note 30 *supra*.

[36] 240 Miss. at 515, 127 So. 2d at 860; *see* note 17 *supra*.

[37] 240 Miss. at 520, 127 So. 2d at 862. Although the plaintiff was accepting the direction of the hauler at the time of the accident, there was no evidence the plaintiff had consented to become the hauler's employee. *Id.* at 516, 127 So. 2d at 860. Further, the assistance offered by plaintiff was customary and promoted his employer's business interests. *Id.*, 127 So. 2d at 860. The assistance was a small part of the moving operation and the hauler did not pay for it. *Id.*, 127 So. 2d at 860.

[38] *Id.* at 520, 127 So. 2d at 862. The court took this requirement from the Workmen's Compensation Act. *Id.* at 515, 127 So. 2d at 860. MISS. CODE ANN. § 71-3-3(d) (Supp. 1980) provides: " 'Employee' means any person . . . in the service of an employer under any contract of hire . . ., written or oral, express or implied [excluding independent contractors]."

[39] 240 Miss. at 519-20, 127 So. 2d at 862.

[40] *Id.* at 520, 127 So. 2d at 863. In rejecting the hauler's argument that it was im-

sion has been diminished considerably in recent years by the court's willingness to find multiple employers "as to the same act."[41] Respon-

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mune from suit because it was engaged in a common project with plaintiff's employer, the court stated: "This State is one of a majority of States where the immunity of the Act is granted the employer only. An injured employee may bring a common law action against any person except his employer." *Id.*, 127 So. 2d at 863. *See* note 22 *supra.*

[41] *See* text accompanying notes 45 through 55 *infra.* The traditional multiple employment situations are joint employment and dual employment. 1C A. Larson, The Law of Workmen's Compensation § 48.40, at 8-394 (1980). These two situations are defined by Larson as follows:

> Joint employment occurs when a single employee, under contract with two employers, and under the simultaneous control of both, simultaneously performs services for both employers, and when the service for each employer is the same as, or is closely related to, that for the other. In such a case, both employers are liable for workmen's compensation.
>
> Dual employment occurs when a single employee, under contract with two employers, and under the separate control of each, performs services for the most part for each employer separately, and when the service for each employer is largely unrelated to that for the other. In such a case, the employers may be liable for workmen's compensation separately or jointly, depending on the severability of the employee's activity at the time of injury.

Id. Larson's definition is discussed in an early Mississippi case, National Sur. Corp. v. Kemp, 217 Miss. 560, 565-66, 65 So. 2d 840, 843-44 (1953) (suggestion of error). There the court found the injury of a cotton gin employee was compensable by the gin even though the injury occurred during the off-season while the employee was putting up political campaign signs for one of the partners. *Id.* at 561, 65 So. 2d at 841. The court reasoned that the authority of the partner to direct the employee's activities came from the gin contract and, so, the gin should be responsible for compensation. *Id.*, 65 So. 2d at 841. "The dual employment cases are not relevant, because [the injured employee] was not employed by two employers, but by only one, the partnership." *Id.*, 65 So. 2d at 841. In his dissenting opinion, Judge Lotterhos argued that the situation being considered should be distinguished from those where an employee is sent on a private errand by his employer, the theory used by the court. *Id.* at 565, 65 So. 2d at 843. Quoting the Larson treatise, Lotterhos found the situation to be one of true dual employment:

> When there is a true dual employment, and the particular industry in which the injury occurs can be clearly identified, it is only logical, under compensation theory, that that industry should bear the compensation cost. . . . The dual-employment rule should be resorted to only when the complete identification of the employee's activities at the time of injury with a single employer is beyond dispute. . . . [I]f there is any evidence of joint service, added to the conceded fact of employment by both employers, there can be no great unfairness in imposing shared liability on the employers.

Id., 65 So. 2d at 843.

In Cook Constr. Co. v. Smith, 397 So. 2d 536 (Miss. 1981), a case decided subsequent to *Ray v. Babcock & Wilson Co.*, the appellants argued that an employee seeking compensation was a dual employee doing the work of his other employer at the time of injury, and, thus, appellants were not liable for compensation benefits. *Id.* at 537. Appellants made use of the dual employment concept in attempting to avoid paying compensible in part for this shift in perspective is the apparent decision by the court that equal treatment is required for compensation cases and cases involving employers' immunity.[42] With respect to granting immunity, the strict standards of *Clark*[43] have been abandoned for the liberal tests the court has always pursued in granting compensation coverage.[44] Thus, in *Robertson v. Stroup,*[45] the court barred a filling station employee from suing the car rental licensee with whom the station owner had contracted.[46] Citing a 1934 case,[47] the court reasoned that the station owner was an employee of the licensee[48] and this made

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sation. *Id.* This argument seems to be closer to the dissenting view of Judge Lotterhos in *National Sur. Corp. v. Kemp. See* notes 45 through 55 and 80 through 91 and accompanying text *infra.*

[42] *See* Biggart v. Texas E. Transmission Corp., 235 So. 2d 443, 447 (Miss. 1970) (quoting Stubbs v. Green Bros. Gravel Co., 206 So. 2d 323, 325 (Miss. 1968)) (consistency requires equal treatment in compensation and immunity cases); Robertson v. Stroup, 254 Miss. 118, 124, 180 So. 2d 617, 620 (1965) (party who would be found to be employee for compensation purposes is employee for purposes of immunity).

[43] *See* text accompanying notes 38 and 39 *supra.*

[44] *See, e.g.,* Boyd v. Crosby Lumber & Mfg. Co., 250 Miss. 433, 443-44, 166 So. 2d 106, 110 (1964) (control test and relative-nature-of-work test are ones used for compensation cases); Laurel Daily Leader, Inc. v. James, 224 Miss. 654, 664, 80 So. 2d 770, 773 (1955) (rule more liberal in compensation cases). The relative-nature-of-work test used in addition to the common law control test stresses elements more relevant to the aim of passing along the costs of industry to the consumer. *See* 25 Miss. at 443-44, 166 So. 2d at 110 (different criteria involved in determining employment relation in compensation cases). Under this test, the nature of the claimant's work, its relation to the employer's enterprise, whether it can carry its own accident burden, and the duration of the work are some of the factors considered. *Id.,* 166 So. 2d at 110.

In Georgia-Pacific Corp. v. Crosby, 393 So. 2d 1348, 1349-50 (Miss. 1981), a case decided subsequent to *Ray v. Babcock & Wilson Co.,* the court continued in this direction. Relying heavily on *Boyd,* the court upheld an award of worker's compensation benefits by applying first the relative-nature-of-work test, *id.* at 1350, and also the right to control test. *Id.*

[45] 254 Miss. 118, 180 So. 2d 617 (1965).

[46] *Id.* at 126, 180 So. 2d at 620. The plaintiff's employer operated a rental car business on a commission basis from the defendant licensee. *Id.* at 121, 180 So. 2d at 618. Under the agreement, plaintiff's employer also serviced the cars and received payment for the service in addition to the commission. *Id.*, 180 So. 2d at 618. Plaintiff performed work at the filling station unrelated to the rental business, but at times serviced, delivered, and rented the rental cars. *Id.*, 180 So. 2d at 618. Plaintiff had delivered a rental car to the airport and was being driven back to the filling station by an employee of the defendant in defendant's employee's own car. The car went out of control and the plaintiff was injured in the ensuing accident. *Id.* at 122, 180 So. 2d at 618-19.

[47] Texas Co. v. Mills, 171 Miss. 231, 242-44, 156 So. 866, 868-69 (1934) (contractor's driver also an employee of company because employer-employee relation existed between company and contractor).

[48] 254 Miss. at 125, 180 So. 2d at 620. The plaintiff had received workers' compensa-

the plaintiff also the licensee's employee.[49] In *Biggart v. Texas Eastern Transmission Corp.,*[50] the court barred a wrongful death action against a pipeline owner by the statutory beneficiaries of an employee of the pipeline contractor.[51] Applying the liberal tests of *Robertson,*[52] the court reasoned that since the pipeline contractor was subject to the control of the owner,[53] the contractor was the owner's employee.[54] Thus, the court concluded, the contractor's employee was also an employee of the owner.[55]

In the instant case, the court reasoned that since, at the time of the accident, plaintiff was accepting the supervision of defendant[56] and since plaintiff had accepted such supervision for several weeks prior to the accident,[57] defendant had the right to control plaintiff's work.[58] Further, since the traditional test of an employer-employee relationship is whether or not the employer has the right to control the details of the employee's work,[59] plaintiff was defendant's employee.[60] The court concluded that since Bechtel was also plaintiff's employer[61] and since an employee may have more than one employer with respect to the same work,[62] plaintiff was a dual employee of both Bechtel and

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tion benefits from his employer. The court concluded that the employer had acted as defendant's agent in paying such benefits, and, so, plaintiff was barred from pursuing any other remedy against the defendant. *Id.,* 180 So. 2d at 620.

[49] *Id.,* 180 So. 2d at 620.

[50] 235 So. 2d 443 (Miss. 1970).

[51] *Id.* at 447. The employee was killed when a gas pipeline ditch caved in on him. *Id.* at 443-44. He had been ordered to shovel dirt from the ditch by one of defendant's employees. *Id.*

[52] *See id.* at 444 (traditional test is right to control details of employee's work).

[53] *Id.* Though it is not specifically mentioned in the opinion, the stipulations contained in an appendix to the opinion state that defendant's control of plaintiff and other of the contractor's employees was by contractual agreement. *See id.* at 448 (listing defendant's rights in the control of the contractor's employees).

[54] *Id.* at 444.

[55] *Id.* at 447.

[56] Ray v. Babcock & Wilcox Co., 388 So. 2d 166, 167 (Miss. 1980). *See* note 4 *supra.*

[57] 388 So. 2d at 167.

[58] Although the opinion does not expressly make this assertion, it is clearly implicit in the court's subsequent conclusions. *Id.* at 168.

[59] *Id.* (quoting Biggart v. Texas E. Transmission Corp., 235 So. 2d 443, 444-45 (Miss. 1970)).

[60] 388 So. 2d at 168.

[61] *Id.* Evidently, the court did not entertain the possibility that plaintiff was a loaned servant of defendant and temporarily out of the employ of Bechtel. *See* text accompanying notes 38 and 39 *supra.*

[62] 388 So. 2d at 168 (quoting Biggart v. Texas E. Transmission Corp., 235 So. 2d 443, 445 (Miss. 1970) (citing Boyd v. Crosby Lumber & Mfg. Co., 250 Miss. 433, 166 So.

defendant.[63] Therefore, since the rule[64] is that multiple employers are immune from common law liability when an employee is working for two employers as to the same act, even though only one has actually provided workmen's compensation insurance,[65] the defendant is immune from common law liability.[66]

The result reached by the court in the instant case is not without merit. Indeed, any number of arguments might be, and have been, advanced successfully in its favor.[67] The significance of the court's decision in the instant case is not in the outcome, however, but in the way the court went about reaching it. The court purported to be following *Robertson* and *Biggart,* but those cases involved factual situations which differed significantly from that of the instant case.[68] In *Robertson,* the general contractor was claiming to be the employer of the subcontractor's employee.[69] The same was true in *Biggart.*[70] In finding the employees involved to be employees of two employers, the court first found the subcontractor to be an employee of the general contractor and, from that fact, derived the employment status of the subcontractor's employee.[71] However, assuming the court's deductive process is valid, it does not apply to the facts in the instant case.[72] Nor does the *Robertson* court's observation apply that, if the plaintiff in that case had been seeking compensation benefits, the defendant general contractor would have been found to be his employer.[73] Aside from the

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2d 106 (1964); Meridian Taxicab Co. v. Ward, 184 Miss. 499, 186 So. 636 (1939); Texas Co. v. Mills, 171 Miss. 231, 156 So. 866 (1934)).

[63] 388 So. 2d at 168.

[64] *See* Robertson v. Stroup, 254 Miss. at 125, 180 So. 2d at 620 (liberal test in granting compensation).

[65] 388 So. 2d at 167.

[66] *Id.* at 168.

[67] For example, it could be argued that whenever an employee is working on a project that is integral to and promotes the business interests of his employer, he is exposed to the sorts of risks of the enterprise which workers' compensation is intended to cover. *See* text accompanying notes 11 through 13 *supra. See generally* 2A A. LARSON, *supra* note 17, § 72.32, at 14-68 to -69 (considerations in granting subcontractors immunity).

[68] *See* notes 45 through 55 and accompanying text *supra.*

[69] *See* notes 45 through 49 and accompanying text *supra.*

[70] *See* note 53 and accompanying text *supra.*

[71] *See* notes 45 through 55 and accompanying text *supra.*

[72] *See* 388 So. 2d at 167 (facts of case). Both defendant and plaintiff in the instant case were hired by plaintiff's employer, Bechtel. *Id.* The closest the court could have come to following the procedure described would have been to find defendant an employee of Bechtel, making the plaintiff and defendant coemployees, and under *McCluskey,* defendant would be immune. *See* note 21 *supra.*

[73] 254 Miss. at 125, 180 So. 2d at 620. *See* note 41 and accompanying text *supra.*

fact that such considerations are irrelevant with respect to the policy of workers' compensation,[74] the only way a subcontractor has been held liable for compensation benefits to a general contractor's employee has been under the loaned-servant doctrine.[75] In such a situation, the plaintiff would not be considered an employee of anyone but the subcontractor.[76] The court relied on *Biggart* to find that the defendant in the instant case had the right to control the plaintiff, but failed to mention that the general contractor in *Biggart* had control over the subcontrator's employees by virtue of a written contract.[77] While the plaintiff's acceptance of directions from the defendant may be conclusive as to actual control, the court has traditionally required a finding that the would-be employer had the right to control the employee as well.[78] In the absence of an express agreement, as in *Biggart,* the finding of such a right would seem to be a conclusion of fact. The court in the instant case did not reveal why it thought such a conclusion must be reached as a matter of law.[79] The most disturbing aspect of the court's opinion, however, is its parenthetical reference to "dual employment."[80] By inserting those words into its opinion, the court has inserted a term of art with an accepted meaning.[81] Since its reference followed the description of a situation bearing faint resemblance to any customarily described by "dual employment,"[82] the court may not have meant all that it seemed to say.[83] Dual employment generally suggests an employee with two separate jobs and sets of duties.[84] The question is one of determining whose job the employee was doing at the time of the accident.[85] "Joint employment" is sometimes used in reference to employment by two persons as to the same act,[86] and this might be a preferable way to label the finding in the instant case.[87] The effect would be to make both employers jointly and severally liable for the plaintiff's compensation.[88] Thus, the award against only Bechtel would be appropriate, although the defendant could have been held liable as well.[89] The instant case also lends itself to a loaned-servant approach more readily than the dual employment concept.[90] Of course, the court may adopt as its definition of "dual employment" something other than the traditional one. Communication is greatly facilitated, however, when terms are used in their accepted sense. This is especially true in the judicial realm where the twisting of concepts to fit particular ends does not serve the objectives of predictability and accessability which are essential to good law. The practical effect of the court's decision in the instant case is to make it much more unlikely that an injured employee can recover in tort from any employment-related party. This approaches the adoption of the common employment doctrine.[91] If the court, despite its previous opposition to such a course,[92] desires to adopt the above doctrine, it should do so in an open manner. Frankness, however, is not enough. The major task before the court is to consider, in light of workers' compensation policy, when, if ever, it is appropriate to grant immunity to more than one employer with respect to the same injured employee. The court should find those occasions to be rarer than its recent decisions indicate.

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[74] This becomes apparent when the principal aims of workers' compensation are considered. *See* notes 11 through 13 and accompanying text *supra.* Occasions when employees seek to impose liability for compensation are typically those where the injury occurred because of an ordinary occupational risk and not because of negligence. *See* note 31 *supra.* Since it is these very sorts of injuries the Act is intended to compensate, a policy of liberal construction is appropriate. *See* note 44 *supra* (discussing liberal approach to compensation cases). When the finding of an employment relation will serve to bar the employee's common law tort action, however, the focus should not be on whether the injured employee should obtain relief but on who should be the source of that relief. To determine this involves looking at the role of the questioned work in the overall enterprise. *See* note 43 *supra.* It also involves considering other aims of workers' compensation, such as providing incentives for safe work practices by employers. *See* note 90 *infra.*

[75] *See* note 31 *supra.*

[76] *See* 388 So. 2d at 168. The reason an employer argues that his employee is loaned is to escape vicarious liability in tort or liability for workers' compensation. *See* note 30 *supra.*

[77] *See* 388 So. 2d at 167 (discussing *Biggart*); note 53 *supra.*

[78] *See* 388 So. 2d at 168 (control of defendant); notes 30 and 44 *supra.*

[79] *See* 388 So. 2d at 167.

[80] *See id.* (describing multiple employment).

[81] *See* note 41 *supra.*

[82] *Compare* 388 So. 2d at 167 *with* 1C A. LARSON, *supra* note 41, §§ 48.40, .50.

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[83] It is reasonable to assume, however, that the court must have been aware of the term's accepted use, as the court frequently cites and follows the Larson treatise. *See* Boyd v. Crosby Lumber & Mfg. Co., 250 Miss. 433, 462-63, 166 So. 2d 106, 119 (1964) (dissenting opinion) (Larson's views should not replace Mississippi laws).

[84] *See* note 41 *supra* (traditional meaning of "dual employment").

[85] *See* 1C A. LARSON, *supra* note 41, § 48.50, at 8-411; note 41 *supra.*

[86] *See, e.g.,* Freeman v. Augustine's, Inc., 46 Ill. App. 3d 320, 360 N.E.2d 1245, 1248-49 (1977) (laundry worker hired by motel but directed by restaurant was joint employee); Mead v. Cole, 8 A.D.2d 904, 186 N.Y.S.2d 969, 970-71 (1959) (general employer and lessee of tractor driver jointly liable for employee's compensation).

[87] Indeed, the court's decision in *Robertson v. Stroup* is classified under that label. *See* 1C A. LARSON, *supra* note 41, § 48.40, at 8-405 n.95 (joint employment decisions).

[88] *See* note 41 *supra.*

[89] *Id.*

[90] *See* note 22 *supra.* Defendant's actual control over plaintiff and plaintiff's acquiescence to that control are both indicative of defendant's right to control plaintiff in the details of his work. *See* text accompanying notes 56 and 58 *supra.* Further, the duration of the employment and the fact that defendant was charged for plaintiff's work are elements that would tend to show a contract of hire between them. *See* text accompanying note 30 *supra.* There are also policy considerations favoring the loaned-servant approach. The court's decision imposes no liability on a defendant who, the facts indicate, breached one of the most fundamental duties of an employer—the duty to provide a safe workplace. *See* notes 2 and 9 *supra.* Since the defendant paid no compensation insurance premiums for plaintiff, yet enjoyed the benefits of plaintiff's work, the court's decision provides no reason for the defendant to perform its duties as an employer with respect to any of Bechtel's employees used in the same manner. *See* note 3 *supra.* If plaintiff had been found to be defendant's borrowed servant, he probably would have been limited to workers' compensation benefits from the defendant. *See* note 31 *supra.* At least the costs of his injury would have been borne by the employer directly benefiting from his work and whose negligence allegedly resulted in the injury. *See* note 41 *supra.*

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[91] *See* note 22 and accompanying text, and note 29 *supra*.

[92] *See* note 22 and accompanying text *supra*.

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Errata

Page 252, line 6 should read: "A decree issued pursuant to a guardian's request for the sale of land owned by his ward is also void unless the procedure outlined in section 93-13-281 of the Mississippi Code is followed.[99]"

Footnote 99 should read: "*See* notes 50 and 96 *supra*."

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COMMENCING A CASE UNDER THE BANKRUPTCY REFORM ACT OF 1978: A PRIMER*

*R. Glenn Ayers***

INTRODUCTION

Enactment of the Bankruptcy Reform Act of 1978[1] [the Bankruptcy Code] with its simplified provisions has coincided with a general downturn in the American economy. The result has been a significant increase in the number of bankruptcy filings, both nationwide and in Mississippi.[2] Although many attorneys involved in these proceedings have experience in the bankruptcy field, others have had little exposure to bankruptcy practice. This article is a "primer," written to guide the novice attorney through the substantive and procedural shoals of bankruptcy.

This "primer" is not by any means a complete guide to the Bankruptcy Code. Rather, it is a detailed guide to the initiation of a proceeding under the Code. Only three subjects are covered: (1) the structure of the Code and alternative proceedings provided; (2) a description of those persons who may (or should) file bankruptcy; and (3) the pleadings necessary and procedures to be followed in commencing a case under the Code.

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* A preliminary version of this article was presented to a seminar on "Business Reorganizations Under the Bankruptcy Act of 1978," jointly sponsored by the Mississippi Institute for Continuing Legal Education and the Mississippi Bankruptcy Conference, March 27-28, 1980, Jackson, Mississippi.

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[1] 11 U.S.C. §§ 101-151326 (Supp. III 1979).

[2] During the 12 months preceding June 30, 1980, 360,960 bankruptcies were filed, an increase of 59.4% over the previous 12 month period. AD. OFF. U.S. CTS. 1980 ANN. REP. 8-9. Total bankruptcies filed in Mississippi increased from 2,654 to 3,265 for the same period. *Id.* at A-120, A-122; AD. OFF. U.S. CTS. 1979 ANN. REP. A-116.

The discussion is not limited to ordinary liquidation proceedings commenced under chapter 7[3] of the Code. Also considered in detail are the preliminary issues related to the filing of cases under chapter 11,[4] seeking reorganization, and cases under chapter 13,[5] asking for the "Adjustment of Debts of An Individual with Regular Income." The article will conclude with a description of the meeting of creditors, which is generally the first time the voluntary debtor[6] and his attorney actually appear at the bankruptcy bar.

Where useful, local rules or procedures adopted by Mississippi's bankruptcy judges are discussed. Complete sets of those local rules are appended to this article.[7]

I. THE STRUCTURE OF THE BANKRUPTCY CODE AND THE ALTERNATIVE PROCEEDINGS PROVIDED

Many attorneys are unfamiliar with the organization of the Code and the remedies it provides. This section should serve to acquaint attorneys with those matters.

A. The Structure of the Code

The structure of the Code is much simpler than that of the Act which it replaces. Like the Mississippi Code, it is divided into chapters with "odd only" numbers—1, 3, 5, 7, 9, 11, 13, and 15. Chapters 1, 3, and 5 are of general application. Chapter 1[8] contains sections dealing with definitional matters. Chapter 3 is entitled "Case Administration"[9] and includes provisions dealing with the commencement of a case, the officers of the bankruptcy court, the administration of the case, and the administrative powers given the bankruptcy judge and officers. Chapter 5 contains provisions dealing with creditors' rights, the debtor's powers and duties, and the property which comes into, or is excluded from, the bankruptcy estate.[10] The remaining chapters, except chapter 15, are devoted to the remedies available in bankruptcy: chapter 7 governs liquidation;[11] chapter 9 the bankruptcy of municipalities;[12] chapter 11 the reorganization of debtors;[13] and, as mentioned above, chapter 13 provides a special remedy for qualified individuals in the form of "Adjustment of Debts of an Individual with Regular Income."[14]

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[3] 11 U.S.C. §§ 701-766 (Supp. III 1979).

[4] *Id.* §§ 1101-1174.

[5] *Id.* §§ 1301-1330.

[6] Persons and municipalities protected by the Bankruptcy Code are referred to as "debtors." *Id.* § 101(12). The term "bankrupt" is not used in the Code.

[7] *See* Appendix to this article. As of the date of this writing, Judge Glover Roberts, Bankruptcy Judge for the Southern District, had temporarily adopted Judge Barney E. Eaton's rules. Conversation between the author and bankruptcy court (July 15, 1981).

[8] 11 U.S.C. §§ 101-109 (Supp. III 1979).

[9] *Id.* §§ 301-366.

At present, chapter 15[15] applies only in the federal judicial districts in which the United States trustee system exists.[16] This system uses standing trustees employed by the Justice Department rather than court-appointed trustees.[17] The experiment, which expires automatically in five years,[18] was funded in the hope of determining whether a bureaucratic system would be more efficient than the existing scheme. The proponents expect the experiment to recover more for creditors and cost less in "no asset" cases.[19]

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[10] *Id.* §§ 501-554.

[11] *Id.* §§ 701-766.

[12] *Id.* §§ 901-946.

[13] *Id.* §§ 1101-1174.

[14] *Id.* §§ 1301-1330.

[15] *Id.* §§ 1501-151326.

[16] 28 U.S.C. §§ 581-589 (Supp. III 1979). Those districts include Colorado, Delaware, District of Columbia, Kansas, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, North Dakota, Rhode Island, South Dakota, and selected districts in Alabama, California, Illinois, New York, Texas, and Virginia. *Id.* § 581.

[17] The standing trustees were proposed to relieve bankruptcy judges of many of their administrative and supervisory roles and to serve as bankruptcy watchdogs to prevent fraud, dishonesty, and overreaching in the bankruptcy area. H.R. REP. No. 95-595, 95th Cong., 1st Sess. 4, 88 (1977), *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5963, 5965-66, 6049.

[18] Act of Nov. 6, 1978, Pub. L. No. 95-598, Tit. IV, § 408(c), 92 Stat. 2687 provides that the United States Trustee System is automatically repealed on April 1, 1984. This notation appears as a preamble to 28 U.S.C. § 581 (Supp. III 1979) but was not codified as a part of that section.

[19] The United States trustee is required to recover assets for the benefit of creditors before they can be paid, which should cause the system to operate more for the benefit of creditors than administrators. H.R. REP., *supra* note 17, at 109. Further in "no asset" cases where there is no surplus available after liquidation to pay a private trustee, the United States trustee is available to expedite the proceedings by pursuing assets that might otherwise go undetected. *Id.*

B. *The Remedies: Chapters 7, 11, and 13*

The Code, like its predecessor, the Bankruptcy Act of 1898 [the Bankruptcy Act],[20] continues to offer qualified debtors a choice between liquidation and reorganization. Liquidations are governed by chapter 7,[21] business reorganizations by chapter 11,[22] and chapter 13 is available to an "individual with regular income" who wishes to propose an "adjustment" of his debts.[23] Petitioning creditors may file involuntary proceedings under chapter 7 or chapter 11.[24] Selection of the proper chapter is essential, and bankruptcy counsel must be familiar with both the legal and practical dimensions of this choice.

Section 109(b)[25] largely determines the technical, legal requirements. It provides that chapter 7 is available to any "person"[26] who is not:

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[20] The Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978), permitted six alternatives to liquidation:

(a) Section 77 of the Bankruptcy Act, 11 U.S.C. § 205 (1976) (amended 1978), provided for railroad reorganization. After the Rules of Bankruptcy Procedure were adopted, these were referred to as Chapter VIII proceedings;

(b) Chapter IX, §§ 81-98, 11 U.S.C. §§ 401-418 (1976) (amended 1978), provided debt adjustment for public subdivisions, agencies, and instrumentalities.

(c) Chapter X, §§ 101-276, 11 U.S.C. §§ 501-676 (1976) (amended 1978), provided for corporate reorganization under a court-appointed trustee. This was the most complex and comprehensive provision of the Act.

(d) Chapter XI, §§ 301-399, 11 U.S.C. §§ 701-799 (1976) (amended 1978), provided for arrangements of corporate and other qualified debtors. Most frequently used by businesses seeking "reorganization," it did not require trustee appointment.

(e) Chapter XII, §§ 401-526, 11 U.S.C. §§ 801-926 (1976) (amended 1978), provided for real property arrangements. Chapter XII bankrupts could not be corporations. Further, only debtors whose principal (or only) asset was realty were eligible for relief under Chapter XII.

(f) Chapter XIII, §§ 601-686, 11 U.S.C. §§ 1001-1086 (1976) (amended 1978), entitled "Wage Earners' Plans," provided for arrangements for wage earning individuals.

[21] 11 U.S.C. §§ 701-766 (Supp. III 1979).

[22] *Id.* §§ 1101-1174.

[23] *Id.* §§ 1301-1330. Chapter 13 may also be used to reorganize businesses so long as the business is a sole proprietorship.

[24] *Id.* § 303(b). Involuntary petitions under chapter 13 are not permitted. Further, an alleged debtor against whom a proceeding is filed must be eligible for treatment under both the Code and the particular chapter selected by the petitioning creditors. *Id.*; *see* text accompanying note 183 *infra.* No involuntary petition may be filed against either a farmer or a nonprofit corporation. *See* note 186 and accompanying text *infra.*

[25] 11 U.S.C. § 109(b) (Supp. III 1979).

[26] See text accompanying note 103 *infra* for a discussion of "person."

> (1) a railroad;
>
> (2) a domestic insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union; or
>
> (3) a foreign insurance company, bank, savings bank, cooperative bank, savings and loan association, building and loan association, homestead association, or credit union engaged in such business in the United States.[27]

Section 109(c) describes the municipalities which may file under chapter 9,[28] and section 109(d) states that persons eligible to use chapter 11 include all persons eligible to file under chapter 7, except stockbrokers and commodity brokers.[29] Further, railroads are permitted to seek relief (*i.e.*, reorganization) under chapter 11.[30] Excluded from chapter 7 and outside the scope of chapter 13,[31] railroad bankruptcies are thus limited to reorganization proceedings. This continues a longstanding public policy.[32]

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[27] 11 U.S.C. § 109(b) (Supp. III 1979). For a discussion of remedies available for domestic and foreign thrift insurance companies, see notes 124 through 126 and accompanying text *infra*.

[28] An entity is eligible for chapter 9 if it:

> (1) is a municipality;
>
> (2) is generally authorized to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
>
> (3) is insolvent or unable to meet such entity's debts as such debts mature;
>
> (4) desires to effect a plan to adjust such debts; and
>
> (5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
>
> (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
>
> (C) is unable to negotiate with creditors because such negotiation is impracticable; or
>
> (D) reasonably believes that a creditor may attempt to obtain a preference.

11 U.S.C. § 109(c) (Supp. III 1979).

[29] Stockbrokers and commodity brokers are limited to Chapter 7, for they are also excluded from chapter 13. *Id.* § 109(d) & (e). There is an interesting misprint in the current § 109(d). Presently, the subsection excludes "stockholders and commodity brokers." This will be corrected in the pending technical amendments bill to read "stockbrokers." S. 863, 97th Cong., 1st Sess. § 5(C) (1981).

An interesting question arises: Does present § 109(d) exclude any *stockholder* from filing in chapter 11? After all, the statutory language could not be clearer.

[30] 11 U.S.C. § 109(d) (Supp. III 1979). For the provisions dealing with railroad reor-

Although chapter 11 is available to any "person," whether corporate or human, at least one bankruptcy judge has held that chapter 11 is available only to a debtor engaged in business. Judge Harold Lavien, in *In re Ponn Realty Trust*[33] has ruled that "[c]ertainly the legislative history can leave no doubt that Chapter 11 of the Bankruptcy Code was intended for utilization solely in the business setting and not in a consumer context. Indeed, . . . provisions within Chapter 11 itself would so indicate."[34] If Judge Lavien is correct, all nonbusiness arrangements of debt will be confined to chapter 13.[35]

Chapter 13 may be used only by "individuals with regular income" who owe less than $100,000 in "non-contingent, liquidated, unsecured debt" and less than $350,000 in "non-contingent, liquidated, secured debt."[36] Stockbrokers and commodity brokers are excluded here, just as they are from chapter 11.[37]

Although the debt limitation and broker exclusion provisions are reasonably straightforward, the limitation of chapter 13 to "individuals with regular income" is not. First, an "individual" in the vocabulary of the Code is a "real" person or human. Although it is nowhere defined precisely in that manner, a close reading of the definitions for "person" and "corporation" leads to that conclusion.[38]

An individual with a regular income is an "individual whose

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ganization, see *id.* §§ 1161-1174.

[31] For an explanation of chapter 13, see text accompanying note 36 *infra.*

[32] The Bankruptcy Act, ch. 541, § 77, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 205 (1976) (amended 1978)), governed railroad bankruptcies. Such actions were referred to as chapter VIII cases. Section 77 of the Act contemplated reorganization of the railroad.

[33] 4 B.R. 226 (Bankr. Ct., D. Mass. 1980).

[34] *Id.* at 231.

[35] Judge Lavien pointed out that chapter 13 contains the broadest debtor relief proceeding and was undeniably intended for use in the consumer context. He further noted that Congress clearly intended chapter 11 as a business reorganization chapter. *Id.*

[36] 11 U.S.C. § 109(e) (Supp. III 1979).

[37] *See* note 29 and acompanying text *supra.*

[38] *See* 11 U.S.C. § 101(8) & (30) (Supp. III 1979) ("person" and "corporation" defined).

income is sufficiently stable and regular to enable such individual to make payments under a plan under chapter 13 of this title [Title II] other than a stockbroker or a commodity broker."[39] This definition can be translated into a simple rule: If the bankruptcy court will accept the chapter 13 plan, the debtor has a "regular income."[40]

Chapter XIII of the Bankruptcy Act[41] limited similar proceedings to persons who were "wage earners." Those were individuals "whose principal income [was] derived from wages, salary or commissions."[42] The Code expands chapter 13 coverage by permitting self-employed individuals, such as proprietors or farmers, to file. Although they are not "wage earners," these individuals usually have the capacity to propose a plan.

Joint proceedings are permitted under chapter 13, but the debt limits—$100,000 unsecured and $350,000 secured—do not increase. Spouses filing jointly must show an aggregate debt within those limits.[43]

C. *Electing a Remedy: Voluntary Proceedings*

An attorney representing a petitioning debtor must elect a chapter under which to file.[44] Should conditions change, however, it is possible to move for conversion to another chapter.[45]

Electing to liquidate or reorganize a business other than a proprietorship—electing between chapters 7 and 11—is basically a business decision. That is, it is not really a question of law but rather a management decision. A debtor with any hope for future financial success should consider reorganization. Even where reorganization under chapter 11 seems unlikely, that chapter may still be desirable. Section 1123(b)(4) now permits confirmation of a chapter 11 proceeding where liquidation is the object.[46] Thus, where liquidation of an ongoing, operating business is preferable—a "going out of business sale" would be a classic example—chapter 11 may be selected.

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[39] *Id.* § 101(24).

[40] Confirmation of chapter 13 plans is governed by *id.* § 1325.

[41] Bankruptcy Act, ch. 541, §§ 601-686, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. §§ 1001-1086 (1976) (amended 1978)).

[42] Bankruptcy Act, ch. 541, § 606(8), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1006(8) (1976) (amended 1978)).

[43] 11 U.S.C. § 109(d) (Supp. III 1979).

[44] The petition must set forth the chapter elected. *See* INTERIM R. BANKR. P. 1002(a), Form No. 1.

[45] 11 U.S.C. §§ 706, 1112, 1307 (Supp. III 1979).

Reorganization of a business can take place under either chapter 11 or chapter 13, as long as the chapter 13 filing involves a sole *proprietorship* owing less than the $100,000 secured and $350,000 unsecured debt limits.[47] Where a client qualifies under either chapter, two differences are crucial. First, a trustee is always appointed in chapter 13 cases and will take charge of the debtor's affairs.[48] In chapter 11 cases, however, a trustee will not be appointed unless a party in interest can show cause or need for such appointment.[49]

In addition, the confirmation of a chapter 13 plan depends solely upon the bankruptcy court's exercise of discretion under section 1325.[50] Section 1325 requires that a plan meet five standards: (1) compliance with Code requirements;[51] (2) payment of filing fees due the court and such fees and other amounts which the plan requires be paid prior to confirmation;[52] (3) the plan must be proposed in good faith;[53] (4) the plan must be in the "best interests of creditors"; it must pay at least as much to unsecured creditors as a chapter 7 proceeding would pay;[54] and (5) secured creditors must either accept the plan or retain their liens and eventually receive the value of their secured claim or receive their collateral from the surrendering debtor.[55] It is important that only secured creditors have any possible "vote." Otherwise, the decision is the court's.

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[46] *Id.* § 1123(b)(4).

[47] *Id.* § 109(d); *see* text accompanying note 36 *supra*.

[48] 11 U.S.C. § 1302 (Supp. III 1979). *Id.* § 1302(b)(3) provides that: "The trustee shall . . . (3) advise [the debtor] other than on legal matters, and assist the debtor in performance under the plan . . . ." An impecunious client might well benefit from such advice, presuming the trustee has the available time and requisite expertise.

[49] *Id.* § 1104(a). Causes include "fraud, dishonesty, incompetence or gross mismanagement" and the need to protect equity security holders and creditors. *Id.*

[50] *Id.* § 1325(a).

[51] *Id.* § 1325(a)(1).

[52] *Id.* § 1325(a)(2).

[53] *Id.* § 1325(a)(3).

[54] *Id.* § 1325(a)(4).

[55] *Id.* § 1325(a)(5).

Compare this proceeding with confirmation under chapter 11 at section 1129.[56] Section 1129(a) lists ten tests, including the "best interests of creditors" test.[57] Further, unsecured creditors must vote on the plan.[58] This vote is not wholly binding, and the court may "cram down" a plan over the objection of creditors.[59]

Where the court attempts to impose a plan over the creditors' objection, an additional test must be met. The "fair and equitable test" of section 1129(b)(2)[60] requires that a "crammed down" plan include extensive provisions protecting secured and unsecured creditors. Secured creditors must be adequately protected under the "crammed down" plan. Three alternatives are available: (1) retention of the lien and payment, under the plan, to the secured creditor of the present value of his claim;[61] (2) sale of the property free of the lien with the lien attaching to proceeds;[62] or (3) receipt by the creditor of the "indubitable equivalent" of his claim.[63] The "crammed down" plan must pay all unsecured creditors in full[64] or on the basis of absolute priority.[65] If any class of unsecured claims is junior to another class, the senior class must be paid in full before the junior class receives anything.

Obviously, it will frequently be more difficult to secure approval for a chapter 11 plan than a chapter 13 plan. Election between the two chapters may be distilled to a single question: Does the absence of a trustee outweigh the difficulty of getting the plan confirmed?

Where the debtor is an individual, perhaps not even engaged in business, his attorney must still consider the alternatives of a chapter 7 or a chapter 13 arrangement. Chapter 7 requires surrender of most property subject to a security interest as part of the liquidation. Chapter 13 enables a qualified debtor to retain such property and simultaneously to reduce a crushing load of unsecured debt.

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[56] *Id.* § 1129(a).

[57] *Id.* § 1129(a)(7)(A)(ii).

[58] *Id.* § 1129(a)(7)(A)(i); *see id.* § 1126 (other provisions for acceptance of plan by creditors).

[59] *Id.* § 1129(b)(1).

[60] *Id.* § 1129(b)(2).

[61] *Id.* § 1129(b)(2)(A)(i).

[62] *Id.* § 1129(b)(2)(A)(ii).

[63] *Id.* § 1129(b)(2)(A)(iii). "Indubitable equivalent" is an ill-defined term derived from *In re* Murel Holding Corp., 75 F.2d 941, 942 (2d Cir. 1935). *See* 124 CONG. REC. S17,421 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini).

[64] 11 U.S.C. § 1129(b)(2)(B)(i) (Supp. III 1979).

[65] *Id.* § 1129(b)(2)(B)(ii).

A chapter 13 plan is acceptable if it is proposed in "good faith" and is in the best interest of creditors, that is, the plan proposes to pay unsecured creditors at least as much as such creditors would receive in a chapter 7 liquidation.[66] Many debtors who might qualify under chapter 13, however, have no assets that could be distributed in a chapter 7 case. Thus, the courts are currently wrestling with "good faith" as it may modify the "best interests" test. The issue is simple and reduces to the question whether a chapter 13 plan may propose to pay nothing (or a very small percentage) to unsecured creditors where the debtor has no assets available for distribution if liquidation were to occur. Several distinct views are emerging. Some courts find that no-payment or low-payment plans violate the "good faith" test. Other courts permit such plans as a matter of course.

Illustrative of cases (and courts) taking the first approach is *In re Iacovoni*,[67] in which the court held that the legislative history of the Code clearly shows that Congress contemplated that all chapter 13 plans would require some payment to unsecured creditors.[68] The court then determined that the "good faith" requirement of section 1325(a)(3), interpreted in light of the congressional intent and legislative history of chapter 13, required the court to deny confirmation of "no-payment" plans, even where the "best interest" test was not violated.[69] Other courts have made a practice of confirming low-payment or no-payment plans where the debtor has no funds available for distribution in chapter 7 and appears to have proposed the plan in what might be called "equitable good faith."[70]

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[66] *Id.* § 1325(A)(3)-(4).

[67] 2 B.R. 256 (Bankr. Ct., D. Utah 1980).

[68] *Id.* at 263-65.

[69] *Id.* at 265-68.

[70] *E.g., In re* Dills, 7 B.R. 160, 164 (Bankr. Ct., E.D. Tenn. 1980) (one percent payment confirmed); *see In re* Heard, 6 B.R. 876, 886 (Bankr. Ct., W.D. Ky. 1980) (collecting "no payment" cases). Judge Barney E. Eaton, the Bankruptcy Judge for the South-

The Eighth Circuit took an entirely different approach in a case in which a couple filing jointly under chapter 13 could not afford to make any payments to unsecured creditors because the debtors had so little income that they could barely afford shelter, food, and clothing. The court reasoned that persons who could not afford to make payments to unsecured creditors in a chapter 13 proceeding were not persons "with a regular income" and thus were not eligible to file under chapter 13.[71]

A final approach has been suggested by Bankruptcy Judge Raphael of the Northern District of Mississippi. He notes that a discharge cannot occur under section 1328 unless a debt is "provided for by the plan."[72] If no payment is made, he suggests that it is possible that a debt has not been "provided for" and may not be discharged. Therefore, he strongly recommends that any plan under chapter 13 make an attempt to pay some amount to unsecured creditors.[73] This debate is likely to continue until further appellate decisions resolve the controversy. Thus, the debtor's attorney should investigate the status of "no-payment" plans in his district prior to electing chapter 13.[74]

For one class of debtors, chapter 13 is the only remedy available. If a debtor has been discharged in bankruptcy during the six years preceeding the filing of the instant petition, he is barred from all other chapters. If the debtor cannot file under chapter 13, he cannot file at all.[75]

D. *Electing a Remedy in Involuntary Proceedings*

Creditors filing involuntary petitions are permitted to select either chapter 7 or chapter 11.[76] No provision is made for an

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ern District of Mississippi, has confirmed "no payment" cases. Telephone interview with Judge Eaton (July 14, 1981).

[71] *In re* Terry, 630 F.2d 634, 634-36 (8th Cir. 1980).

[72] 11 U.S.C. § 1328(a) (Supp. III 1979).

[73] Interview with Bankruptcy Judge Eugene J. Raphael, Oxford, Mississippi (Nov. 13, 1980).

[74] *See In re* Heard, 6 B.R. 876, 885-86 (Bankr. Ct., W.D. Ky. 1980) (lists "no payment" cases).

[75] *See* 11 U.S.C. § 727(a)(1) (Supp. III 1979) (prohibits discharge in chapter 7); *id.* § 1141(d)(3) (prohibits discharge in chapter 11). There is no prohibition against such discharges in chapter 13 proceedings. *In re* Ciotta, 4 B.R. 253 (Bankr. Ct., E.D.N.Y. 1980).

[76] 11 U.S.C. § 303(a) (Supp. III 1979).

involuntary chapter 13[77] or an involuntary chapter 9 bankruptcy.[78] Creditors who believe that a debtor has a greater value as a "going concern" might desire to file for a chapter 11 reorganization.[79] Otherwise, the selection of chapter 7 is generally advisable, principally because chapter 7 filings require the appointment of a trustee.[80]

E. Changing Chapters in Midstream

1. Conversion

In a voluntary case, the debtor, having chosen to proceed under a particular chapter may once, as a matter of right, select another chapter without showing cause.[81] This election is most important where an involuntary chapter 7 debtor desires to convert the proceeding to one under either chapter 11 or chapter 13.[82] However, the debtor's right to conversion *from* chapter 11 is limited. He may not convert, as a matter of right: (1) an involuntary chapter 11; (2) a chapter 11 converted to that chapter for cause shown by another party; or (3) a chapter 11 in which the debtor has lost possession (*i.e.*, a chapter 11 in which a trustee has been appointed).[83]

After a debtor exercises his initial right to convert,[84] or where the debtor in a chapter 11 case finds himself without the right to convert, he, like any other party in interest, may move for conversion to another chapter for cause shown.[85] Of course, a converting debtor must always be qualified as a debtor under the new chapter.[86]

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[77] Congress determined that a provision for involuntary chapter 13 proceedings would be: "bad policy, because chapter 13 only works when there is a willing debtor that wants to repay his creditors. Short of involuntary servitude, it is difficult to keep a debtor working for his creditors when he does not want to pay them back." H.R. REP., *supra* note 17, at 322.

[78] Congress noted that any provision for involuntary chapter 9 proceedings might violate the tenth amendment, being an unwarranted invasion of state sovereignty. Further, as a policy matter, Congress did not want, "the fate of a municipality, governed by officials elected by the people of the municipality, to be determined by a small number of creditors of the municipality." H.R. REP., *supra* note 17, at 321-22.

[79] 11 U.S.C. §§ 1101-1174 (Supp. III 1979).

[80] *See* text accompanying note 422 *infra*.

[81] Proceedings commenced under chapter 7 are governed by 11 U.S.C. § 706(a) (Supp. III 1979), while conversions under chapter 11 are governed by § 1112(a), and those under chapter 13 are governed by § 1307(a).

[82] *Id.* § 706(a).

[83] *Id.* § 1112(a)(1)-(3).

[84] *See* note 81 and accompanying text *supra*.

2. Conversion by Creditors and Other Parties in Interest

Creditors and other parties in interest may move for conversion even where the creditor initially selected the chapter in an involuntary case. Creditors must always show cause, however, and the right to request conversion is governed by rules which limit it substantially.[87]

All requests for conversion for cause shown require notice and hearing.[88] Any request for conversion from either chapter 7 or chapter 11 to chapter 13 will be denied unless the debtor consents.[89] Farmers or non-profit corporations which have filed voluntary chapter 11 proceedings must consent to conversion to chapter 7,[90] and a farmer who filed under chapter 13 must consent to conversion to chapter 7 or chapter 11.[91] Again, the debtor must be qualified as a debtor under the chapter to which conversion is sought.[92]

II. Who May or Should Be a Debtor

Just as those clients that are candidates for bankruptcy are not all candidates for simple liquidation, not every client with financial troubles is a potential candidate for bankruptcy. Certain clients may not be permitted to take advantage of the Bankruptcy Code's provisions, and certain situations may not require the draconian remedy of bankruptcy.

The questions which follow form at least one framework in which to resolve the decision whether to file a petition[93] in bankruptcy for a particular client:

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[85] *See* 11 U.S.C. § 706(b)-(c) (Supp. III 1979) (chapter 7); *id.* § 1112(b)-(c) (chapter 11); *id.* § 1307(c) (chapter 13).

[86] *Id.* §§ 706(d), 1112(d), 1307(f).

[87] *Id.* §§ 706(b)-(c), 1112(b)-(c), 1307(c).

[88] *Id.* §§ 706(b)-(c), 1112(b)-(c), 1307(c).

[89] *Id.* §§ 706(c), 1112(d); *see* note 77 *supra* (unwilling debtor).

[90] 11 U.S.C. § 1112(c) (Supp. III 1979).

[91] *Id.* § 1307(e).

[92] *Id.* §§ 706(d), 1112(d), 1307(f).

[93] The initial pleading in bankruptcy is a "petition," rather than a "complaint." *See*

A. Can this client be a debtor under the Bankruptcy Code?
B. Can this qualifed debtor be discharged or discharge his debts in bankruptcy?
C. Can an involuntary bankruptcy be filed?
D. What benefits will bankruptcy provide?

Involuntary petitions, filed by creditors alleging the bankruptcy of a debtor, are governed by similar considerations, though the perspective is always that of the creditor.[94]

A. Can This Client be a Debtor Under the Bankruptcy Code?

Not every legal or natural person may seek the protection of the Bankruptcy Code; thus, attorneys frequently attempt to file bankruptcy petitions on behalf of clients that cannot qualify.[95] Attorneys for creditors seeking to file involuntary cases must take this analysis one step further. Not only must the debtor be qualified to file but the creditor or creditors must also be qualified to file.[96]

The first and most important test to be met by a prospective debtor in a voluntary bankruptcy is self evident: the debtor must be "insolvent." To be insolvent under the Code, a debtor's assets must be less than his liabilities. This balance sheet test is found in section 101(26).[97] Involuntary debtors need not be actu-

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id. § 301.

[94] *Id.* § 303.

[95] An analysis of chapter proceedings under the Bankruptcy Act filed during the period 1974-1978 in the District of Massachusetts revealed that significant numbers of cases were dismissed because the petitioners were not qualified to seek the protection of the Act. Most frequently dismissed were trusts. R. Ayers, Empirical Study of Chapter XI Proceedings in the District of Massachusetts 1974-78 (March 15, 1979) (unpublished thesis in Harvard Law School Library).

[96] *See* 11 U.S.C. § 303(b) (Supp. III 1979); notes 183 through 201 and accompanying text *infra.*

[97] The definition at 11 U.S.C. § 101(26) (Supp. III 1979) is:

> (26) "insolvent" means—
>
> (A) with reference to an entity other than a partnership, financial condition such that the sum of such entity's debts is greater than all of such entity's

ally insolvent. Section 101(h) permits the bankruptcy court to approve a controverted involuntary filing if the debtor is not paying his debts as they mature or if he has suffered an assignment or receivership of all or most of his property.[98]

Like the Bankruptcy Act,[99] the Code does not always expressly include or exclude various types of persons and entities,[100] but it does provide a starting point—section 109, which is appropriately entitled "Who may be a debtor."[101] Section 109 begins with a simple jurisdictional prerequisite. Any "person" seeking the status of a debtor in bankruptcy must either reside in the United States or must have "a domicile, place of business or property in the United States."[102]

The term "person" used in the jurisdictional statement and elsewhere in section 109 is defined at section 101(30)[103] to in-

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> property, at a fair valuation, exclusive of—
>
> (i) property transferred, concealed, or removed with intent to hinder, delay, or defraud such entity's creditors; and
>
> (ii) property that may be exempted from property of the estate under section 522 of this title; and
>
> (B) with reference to a partnership, financial condition such that the sum of such partnership's debts is greater than the aggregate of, at a fair valuation—
>
> (i) all of such partnership's property, exclusive of property of the kind specified in subparagraph (A)(i) of this paragraph; and
>
> (ii) the sum of the excess of the value of each general partner's separate property, exclusive of property of the kind specified in subparagraph (A)(ii) of this paragraph, over such partner's separate debts . . . .

The basic definition at § 101(26)(A) involves a little more than a simple balance sheet analysis, since calculation of asset value is based upon a somewhat ambiguous term—"fair valuation"—which is not defined, but rather is adopted from the equally ambiguous standards of the Bankruptcy Act, ch. 541, § 1(19), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1(19) (1976) (amended 1978)). For an extensive discussion, see 2 W. COLLIER, BANKRUPTCY ¶ 101.26(4) (15th ed. 1981).

[98] 11 U.S.C. § 303(h) (Supp. III 1979). These standards are at issue only when the petition is controverted. With the exception of the two tests mentioned, the Code does away with the old "acts of bankruptcy" analysis of the Bankruptcy Act, ch. 541, § 3(a), 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 21(a) (1976) (amended 1978)). For a discussion, see 2 W. COLLIER, *supra* note 97, ¶ 303.11.

[99] Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978).

[100] *See* notes 102 through 109 and accompanying text *infra*.

[101] 11 U.S.C. § 109 (Supp. III 1979).

[102] *Id.* § 109(a).

[103] *Id.* § 101(30).

clude individuals, partnerships, and corporations, but not governmental units. Excluded by implication are estates and trusts, which are referred to by the generic term "entity."[104]

In order to determine whether less typical business organizations qualify for protection, it may still be necessary to search the Code, its legislative history, and the case law now emerging. Business trusts are a fairly common form of business organization, as are associations, joint-stock companies, and partnership associations. The Code expressly provides that these entities are included in the term "corporation."[105] Although the Code is not specific, its legislative history makes it clear that the term "unincorporated association," included in the definition of "corporation," encompasses labor unions.[106]

Although certain governmental units may be incorporated (*e.g.*, municipalities), the term "person," of which the term "corporation" is but a subdivision, expressly excludes "governmental units."[107] The Code does, however, provide for the bankruptcies of "municipalities" in chapter 9.[108] Section 109(c) defines the entities that may seek relief under the provisions of that chapter.[109]

Within this group of business organizations, the trust seems to cause the most difficulty. The bankruptcy attorney must distinguish between the business trust, an entity qualifying for treatment as a corporate "person," and the beneficial trust which happens to be engaged in some commercial activity. The ordinary beneficial trust is not a "person" and is thus not eligible for the protection of the Code. Distinguishing business trusts from beneficial trusts posed problems under the Bankruptcy Act,[110] and several courts have already wrestled with the issue under the Bankruptcy Code.

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[104] *Id.* § 101(14).

[105] *Id.* § 101(8).

[106] H.R. REP., *supra* note 18, at 309; S. REP. No. 95-989, 95th Cong., 2d Sess. 22 (1978).

[107] 11 U.S.C. § 101(30) (Supp. III 1979); *see* H.R. REP., *supra* note 17, at 313; S. REP., *supra* note 106, at 25.

[108] 11 U.S.C. §§ 901-946 (Supp. III 1979).

[109] *Id.* § 109(c).

[110] *See, e.g.*, Associated Cemetery Management, Inc. v. Barnes, 268 F.2d 97, 101-02 (8th Cir. 1959) (private trust not covered). Under § 1(8) of the Bankruptcy Act, ch. 541, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. § 1(8) (1976) (amended 1978)),

The first reported case raising the question was filed less than two months after the Code went into effect. On November 28, 1979, the Bankruptcy Court for the Middle District of Florida received the voluntary chapter 11 petition of Treasure Island Land Trust; the debtor's right to file was challenged by secured creditors within two days.[111] Analyzing the sections reviewed above, together with prior statutory and case law, the court ruled that the trust involved was not a "business trust,"[112] but rather a "non-business trust."[113] The court reasoned that a "business trust," like a corporation, is organized to carry on a business or a "commercial activity for profit," while a "non-business trust" is formed primarily to preserve a *res*.[114] The implication is that although a business trust, like a corporation, takes risks in hopes of profit, a non-business trust is not permitted to take such risks.

Treasure Island Land Trust, however, had obviously been set up to purchase and hold real estate for speculation, which is the sort of thing business trusts are frequently created to do. "Beneficial interests" were bought and sold like corporate shares and were held by a large number of participants.[115] On the surface, this trust looked and operated like a corporation. On the other hand, Treasure Island Land Trust was not organized under any state "business trust" statute; it had not registered with the State of Florida as a business trust; the original trust agreement did not permit the trustee to engage in business activities; and the trustee had previously petitioned for permission to collect assessments in order to "preserve and protect assets and properties."[116] The court stated that these and other facts were sufficient to justify a finding that this entity was a "non-

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only business trusts "wherein beneficial interest or ownership is evidenced by certificate or other written instrument" could file in bankruptcy.

[111] *In re* Treasure Island Land Trust, 2 B.R. 332, 333 (Bankr. Ct., M.D. Fla. 1980).

[112] *Id.* at 336.

[113] *Id.* at 334.

[114] *Id.*

[115] *Id.* Note that this would have fit the description used under the Bankruptcy Act. *See* note 110 *supra.*

[116] *In re* Treasure Island Land Trust, 2 B.R. 332, 334-36 (Bankr. Ct., M.D. Fla. 1980).

business" trust and, as such, not permitted to seek the protection of the Bankruptcy Code.[117]

More recently, the Southern District of Florida addressed the same issue in *In re Norman Cohen, Trustee.*[118] In an extensive opinion that frequently cited *In re Treasure Island Trust,* Bankruptcy Judge Weaver ruled:

> The debtor is stuck with the characteristics of the entity he has chosen. He cannot have it all ways in his favor. The debtor chose the form of entity which would provide for him the most favorable tax treatment and the most convenient method of operation. Having enjoyed the benefits of the trust form of existence, the "trustee" cannot now ignore the detriments—this land trust is simply not entitled to protection under the Bankruptcy Code.[119]

Judge Weaver analyzed the trust agreement, activities of the trust and its trustee, Florida statutory law, case law under the Bankruptcy Act, and the legislative history of the Code. Like the court in *In re Treasure Island Trust,* he was particularly persuaded by the fact that, other than purchasing land for resale at a profit, the trust never did anything that looked like "business."[120]

Bankruptcy Judge Harold Lavien of the District of Massachusetts perceived the issue somewhat differently in *In re Ponn Realty Trust:*[121]

> The court concurs with the debtor that, under the proper circumstances, a business trust such as a realty trust with transferrable shares may be a proper debtor under chapter 11 of the Bankruptcy Code. The issue presented herein, however, is broader than the issue addressed in the debtor's arguments. In the present case, the sole asset of the debtor trust is a one-family residence occupied by the trustee and her family. The real issue presented is whether chapter 11 is an appropriate vehicle for the adjustment of mortgage indebtedness on a sin-

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[117] *Id.* at 336.

[118] 4 B.R. 201 (Bankr. Ct., S.D. Fla. 1980).

[119] *Id.* at 209.

[120] *Id.* at 206-07.

[121] 4 B.R. 226 (Bankr. Ct., D. Mass. 1980).

> gle-family residence.[122]

Judge Lavien reviewed the legislative history of chapter 11 and concluded that it left "no doubt that chapter 11 . . . was intended for utilization solely in a business setting and not in a consumer context."[123]

Section 109 also denies certain corporate persons, duly chartered by governmental authority, the right to proceed in bankruptcy. Section 109(b) provides that domestic insurance companies, banks, and thrift institutions are not permitted to seek liquidation under chapter 7 of the Code, nor are foreign insurance, banking, or thrift institutions which do business in this country.[124] These corporate persons are also excluded from the other chapters of the Code by the remaining subsections of section 109.[125]

These corporations are regulated by state and federal agencies, which are usually the same agencies which grant charters to new banks, savings and loans, or insurance companies. State chartered insurance and thrift institutions in financial difficulty are generally dealt with under state statutory provisions for receiverships.[126] Nationally chartered thrift institutions are governed by federal statutes permitting involuntary receiverships, and the requisite proceedings are generally initiated by the Comptroller of the Currency.[127]

These, then, are the clients for whom voluntary proceedings in bankruptcy may never be filed. But not all bankruptcies are voluntary, and, where an involuntary petition is contemplated under section 303,[128] it is important to remember that the petition may not name a farmer[129] or a non-profit corporation[130] as a debtor.

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[122] *Id.* at 229.

[123] *Id.* at 231.

[124] 11 U.S.C. § 109(b) (Supp. III 1979).

[125] *Id.* §§ 109(c)-(e).

[126] *E.g.,* MISS. CODE ANN. §§ 81-9-1 to -73 (1972) (banks); *id.* §§ 81-12-181 to -185 (Supp. 1980) (savings associations); *id.* §§ 83-6-31 to -43 (Supp. 1980) (insurance companies).

This exclusion from the Bankruptcy Code is no trivial matter. The failure of Bankers Trust Company and its subsidiary, Bankers Trust Savings & Loan, with deposits of $200,000,000, had a dramatic impact in Mississippi. *See* Bankers Trust Co. v. Travis (*In re* Bankers Trust Co.), 566 F.2d 1281, 1283 (5th Cir. 1978) (collapse of Bankers Trust); *accord, In re* Equity Funding Corp., 396 F. Supp. 1266, 1268 (C.D. Cal. 1975) (insurance company collapse).

[127] *See* 12 U.S.C. §§ 191-200 (1976) (national banks); *id.* § 1464(d) (Supp. III 1979) (nationally chartered savings associations).

B. *Debtors and Debts Dischargeable in Bankruptcy*

Other clients that appear qualified to file for relief in bankruptcy may not be able to secure discharge of their debts. Discharge of one's debts and the fresh start made possible by such discharge is the goal and purpose of bankruptcy,[131] and if that remedy is not available the proceeding has accomplished little other than to delay the inevitable onslaught of creditors and other claimants.[132]

The discharge issue can arise in two contexts. First, certain debtors are not permitted to be discharged. Second, certain debts are non-dischargeable and continue to be enforceable even after successful completion of a bankruptcy proceeding.

1. Persons Who Cannot Be Discharged

Individual debtors who are not dischargeable are usually debtors who have been granted discharges in actions under the Code or the Bankruptcy Act at any time during the six years preceeding the new petition.[133] Section 727(a)(8)[134] prohibits

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[128] 11 U.S.C. § 303 (Supp. III 1979).

[129] *Id.* § 303(a); *see* notes 186 through 190 and accompanying text *infra.*

[130] 11 U.S.C. § 303(a) (Supp. III 1979). A wag might suggest that any bankrupt corporation is "non-profit."

[131] Williams v. USF&G, 236 U.S. 549, 554-55 (1915); Board of Equalization v. Coast Radio Prod., 228 F.2d 520, 523 (9th Cir. 1955). This statement does not apply to debtors who are not individuals, since corporate and other entities cannot be "discharged" in chapter 7 liquidations. *See* note 124 and accompanying text *supra.* Corporations, however, frequently seek partial discharges under chapter 11 reorganization proceedings. *See* 11 U.S.C. § 1141(d)(1) (Supp. III 1979) (discharge upon confirmation).

[132] Nothing in the Code prohibits such debtors from filing petitions, so the use of Code filings to delay creditors is certainly possible. Because of the six year previous discharge rule, however, such petitions rarely bring discharge. *See generally* 4 W. COLLIER, *supra* note 97, ¶ 727.11[1] (six year previous discharge).

[133] 11 U.S.C. § 727(a)(8) (Supp. III 1979). This information must be disclosed by the debtor in the "Statement of Financial Affairs" that must be filed by all debtors. *See* 11 U.S.C.A. app., Form 7, question 7, Form 8, question 9 (1976).

Objections to discharge generally take the form of adversary proceedings filed by granting discharges to chapter 7 (liquidation)[135] debtors who have been discharged in any proceeding under the Bankruptcy Act or in any proceeding under the Code unless that debtor is eligible for treatment under section 727(a)(9).[136] Subsection (a)(9) preserves a narrow exception by permitting a chapter 7 discharge for a debtor who has been granted a discharge under chapter 13 of the Code or Chapter XIII of the Bankruptcy Act.[137] The section 727(a)(9) discharge is permitted for new filings within six years by such debtors if the earlier chapter 13 (or XIII) proceeding culminated in the payment of "(A) 100 percent of the allowed unsecured claims . . . ; or (B)(i) 70 percent of such claims; and (ii) the plan was proposed by the debtor in good faith, and was the debtor's best effort . . . ."[138]

Individual debtors who file chapter 11 proceedings may also be denied discharge under the provisions of section 1141(d)(3),[139] which provides that a debtor who (1) proposes a plan calling for the liquidation of all or most of his estate,[140] and (2) who does not "engage in business after consummation of the plan" will be denied a discharge if he would be denied a discharge under chapter 7. Thus, an individual debtor (as compared to a corporate debtor) cannot use chapter 11's liberalized liquidating plan provision to do under chapter 11 what he could not do under chapter 7—liquidate and get a discharge within six years.

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objecting creditors. Where such objections are not filed, case law under the prior Act holds that discharge may occur, irrespective of prior bankruptcies. Matawan Bank v. Feldman, 12 N.J. Misc. 785, 174 A. 442, 443-44 (1934). Of course, the court could always take judicial notice of a prior discharge under the Act. *In re* Hammond, 9 F. Supp. 628, 629 (D. Kan. 1934).

Notwithstanding the old case law, the Code seems to clearly prohibit the grant of a discharge, even though no objection is raised, since it states that a discharge shall be granted *unless* "the debtor has been granted a discharge under this section." 11 U.S.C. § 727(a)(Supp. III 1979).

[134] 11 U.S.C. § 727(a)(8) (Supp. III 1979).

[135] *Id.* §§ 701-766.

[136] *Id.* § 727(a)(9).

[137] Bankruptcy Act, ch. 541, §§ 601-602, 30 Stat. 544 (1898) (repealed 1978) (codified at 11 U.S.C. §§ 1001-1086 (1976) (amended 1978)).

[138] 11 U.S.C. § 727(a)(9) (Supp. III 1979).

[139] *Id.* § 1141(d)(3).

[140] *See id.* § 1123(b)(4) (liquidation provisions); note 46 and accompanying text *supra*.

An individual filing under chapter 11 who does not propose a liquidating plan could be discharged even though he had received a chapter 7 discharge within the preceeding six years. Neither would the debtor discharged under the Bankruptcy Act or chapters 11 and 13 of the Code be barred from discharge under this section. How large this loophole might be is debatable. As discussed above,[141] chapter 11 plans are difficult to confirm. A debtor abusing the bankruptcy process by seeking frequent discharges under various chapters would surely fail to meet the severe tests for confirmation under chapter 11. Further, the court's discretionary power to deny confirmation of a plan not proposed in "good faith"[142] could be exercised to prevent a miscarriage of justice.

All chapter 13 proceedings are exempt from the six-year rule. Chapter 13 contains no prohibition against discharge for those individuals who have been discharged previously in bankruptcy under any provision of the Bankruptcy Code or Act.[143] Again, this is not a large loophole. Only a limited group of individuals can utilize chapter 13.[144] Further, a filing under chapter 13 following shortly upon the heels of another bankruptcy proceeding could be an abuse of the Code's discharge provisions. If such an abuse is shown, the court has the discretionary power to deny relief to the debtor.[145]

Other debtors, even though not involved in bankruptcy proceedings during the preceding six years, may still be denied discharge. Chapter 7 debtors may be denied discharges for various types of fraudulent conduct,[146] as well as for refusing to cooperate with the court.[147] Although it may not be possible to learn about the latter problem in advance, a client whose pre-bankruptcy conduct has been notoriously fraudulent may run afoul of the former. Here, also, chapter 11 incorporates the same limitations on dischargeability used in chapter 7 where a liquidating plan is proposed.[148]

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[141] *See* notes 56 through 65 and accompanying text *supra.*

[142] 11 U.S.C. § 1129(a)(3) (Supp. III 1979).

[143] Analysis of the Code reveals no prohibition against chapter 13 proceedings filed within the six year period following any prior proceeding under any chapter of the Code or Act. *In re* Ciotta, 4 B.R. 253, 255 (Bankr. Ct., E.D.N.Y. 1980).

[144] *See* notes 36 through 43 and accompanying text *supra.*

[145] Although chapter 13 plans may result in discharge, they cannot be confirmed by the court unless the plan is proposed in "good faith." 11 U.S.C. § 1325(a)(3) (Supp. III 1979).

Also, a chapter 13 plan may not be confirmed unless, under its provisions, an unsecured creditor receives at least what he would in a chapter 7 liquidation. Unsecured creditors of a person filing a chapter 7 proceeding, where the person has been a debtor in bankruptcy within the six years prior to filing, are protected by § 727(a)(8)-(9). Therefore, creditors of a chapter 13 debtor must receive similar protection. Cases employing analogous reasoning are *In re* Marlow, 3 B.R. 305 (Bankr. Ct., N.D. Ill. 1980) and *In re* Cole, 3 B.R. 346 (Bankr. Ct., S.D.W. Va. 1980).

Chapter 13 is, again, different and does not incorporate similar standards. Nevertheless, any pre-bankruptcy fraud (or failure to cooperate with the court) would justify either a dismissal by the court for unreasonable delay[149] or a refusal to confirm the plan[150] for lack of good faith by the debtor.[151]

2. Debts Which Cannot Be Discharged

A debtor qualified to file in bankruptcy and seek discharge will benefit from the proceeding only to the extent that his debts are dischargeable. Debts that are non-dischargeable are described in section 523(a),[152] and include:

(1) Certain taxes and customs duties;[153]

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[146] *See* 11 U.S.C. § 727(a)(2)-(4) (Supp. III 1979) (fraudulent actions denying discharge).

[147] *See id.* § 727(a)(6)-(7) (cooperation required on penalty of denial of discharge).

[148] *Id.* § 1141(d)(3); *see* text accompanying note 139 *supra.*

[149] 11 U.S.C. § 1328(e) (Supp. III 1979).

[150] *Id.* § 1307(c)(1).

[151] *Id.* § 1325(a)(3).

[152] *Id.* § 523(a).

[153] 11 U.S.C. § 523(a)(1) (Supp. III 1979) prohibits discharge of debts due:

> (1) for a tax or a customs duty—
>
> (A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(6) of this title, whether or not a claim for such tax was filed or allowed;
>
> (B) with respect to which a return, if required—
>
> (i) was not filed; or
>
> (ii) was filed after the date on which such return was last due, under applicable law or under any extension, and after two years before the date of the filing of the petition; or
>
> (C) with respect to which the debtor made a fraudulent return or willfully attempted in any manner to evade or defeat such tax . . . .

Subsection (1)(A) clearly makes nondischargeable even those tax claims having a priority as administrative expenses under § 507(a). Also, even though a taxing authority

(2) debts which result from loans, obtained by false pretenses, actual fraud, or the use of falsified financial statements relied upon by creditors;[154]
(3) debts which the debtor fails to schedule;[155]
(4) debts created by the fraud of a debtor acting as a fiduiciary, or by embezzlement or larceny;[156]

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claim is a secured claim, it is not dischargeable. *See* H.R. REP., *supra* note 17, at 363 (discussion of § 523); S. REP., *supra* note 106, at 77 (same).

[154] 11 U.S.C. § 523(a)(2) (Supp. III 1979) prohibits discharge of debts:

> (2) for obtaining money, property, services, or an extension, renewal, or refinance of credit, by—
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; or
>
> (B) use of a statement in writing—
>
> (i) that is materially false;
>
> (ii) respecting the debtor's or an insider's financial condition;
>
> (iii) on which the creditor to whom the debtor is liable for obtaining such money, property, services, or credit reasonably relied; and
>
> (iv) that the debtor caused to be made or published with intent to deceive . . . .

Subparagraph (A) must be clearly distinguished from subparagraph (B). Under (A), proof of actual fraud, not constructive fraud, is required. Under (A), a false financial statement, which was only constructively fraudulent, would not prevent discharge. Under (B), the constructively fraudulent financial statement prevents discharge only if there is both reliance and intent to deceive. *See* 124 CONG. REC. H11,095-96 (daily ed. Sept. 28, 1978) (remarks of Rep. Edwards) (discussion of § 523(a)(2)); *id.* S17,412-13 (daily ed. Oct. 6, 1978) (remarks of Sen. DeConcini) (same).

[155] 11 U.S.C. § 523(a)(3) (Supp. III 1979), prevents discharge of debts:

> (3) neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed; in time to permit—
>
> (A) if such debt is not of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing; or
>
> (B) if such debt is of a kind specified in paragraph (2), (4), or (6) of this subsection, timely filing of a proof of claim and timely request for a determination of dischargeability of such debt under one of such paragraphs, unless such creditor had notice or actual knowledge of the case in time for such timely filing and request.

Failure to schedule will not prevent discharge where the creditor with knowledge of the proceeding sleeps on his rights.

[156] 11 U.S.C. § 523(a)(4) (Supp. III 1979) clarifies prior law, forbidding discharges where the debt is "for fraud or defalcation while acting in a fiduciary capacity, embezzle-

(5) debts owed to spouses, former spouses, and children for alimony, maintenance or support;[157]
(6) debts arising from intentional torts;[158]
(7) fines or penalties levied by governmental units;[159]
(8) student loans owed to governmental agencies or nonprofit institutions of higher education;[160] and
(9) certain debts not discharged in prior bankruptcies.[161]

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ment, or larceny."

[157] 11 U.S.C. § 523(a)(5) (Supp. III 1979) prevents discharge of debts due:

> (5) to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement agreement, but not to the extent that—
>
> (A) such debt is assigned to another entity, voluntarily, by operation of law, or otherwise; or
>
> (B) such debt includes a liability designated as alimony, maintenance, or support, unless such liability is actually in the nature of alimony, maintenance, or support . . . .

[158] 11 U.S.C. § 523(a)(6) (Supp. III 1979) prevents the discharge of tort-related debts where such are "for willful and malicious injury by the debtor to another entity or to the property of another entity."

[159] 11 U.S.C. § 523(a)(7) (Supp. III 1979) states that certain government claims are not dischargeable:

> (7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty—
>
> (A) relating to a tax of a kind not specified in paragraph (1) of this subsection; or
>
> (B) imposed with respect to a transaction or event that occurred before *three years* before the date of the filing of the petition . . . .

(emphasis added).

[160] 11 U.S.C. § 523(a)(8) (Supp. III 1979) continues the policy of prohibiting the discharge of loans made to students that are to be repaid:

> (8) [to] a governmental unit or a nonprofit institution of higher education, unless—
>
> (A) such loan first became due before five years (exclusive of any applicable suspension of the repayment period) before the date of the filing of the petition; or
>
> (B) excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents . . . .

The limitations period, five years, is important, as is the hardship discharge permitted by subsection (B).

[161] 11 U.S.C. § 523(a)(9) (Supp. III 1979) prohibits discharge of a debt:

> (9) that was or could have been listed or scheduled by the debtor in a prior case concerning the debtor under this title or under the Bankruptcy Act in which the debtor waived discharge, or was denied a discharge under section

While these nine types of debts are clearly not dischargeable in proceedings under chapters 7 and 11, in chapter 13 proceedings all but one may be dischargeable.

Section 523(a) begins by stating that "[a] discharge under section 727, 1141, or 1328(b) of this title does not discharge an individual from" debts described in the body of the section.[162] This might appear to make debts not dischargeable in chapter 7 also not dischargeable in chapters 11 and 13. However, section 1328(b) applies only where the court decides to grant a discharge in a chapter 13 case in which the plan has not been completed successfully.[163] If a chapter 13 plan is completed, the discharge is granted under section 1328(a)(2), which permits discharge of all debts described in section 523(a) except claims for alimony, maintenance, or support.[164]

This oddity apparently is the result of a misprint or mistake. There is pending in Congress a bill to correct technical and typographical errors,[165] and that bill will change section 1328(a) so that all debts described at section 523(a) are deemed nondischargeable in chapter 13 cases.[166]

In the interim, courts will have to deal with this anomaly. A court might choose to accept section 1328(a)(2) on its face, reasoning that Congress did intend that "[an] embezzler, a thief, or a person convicted of voluntary manslaughter with a wrongful death judgment against him, may erase liability for such conduct by completion of a nominal chapter 13 plan."[167] Such reasoning

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727(a)(2), (3), (4), (5), (6), or (7) of this title, or under section 14c(1), (2), (3), (4), (6), or (7) of such Act.

These are debts that could have been discharged in a prior proceeding but were not because the debtor waived discharge, failed to list the debt, or was denied discharge for fraud or similar conduct. S. REP., *supra* note 106, at 79.

[162] 11 U.S.C. § 523(a) (Supp. III 1979).

[163] *Id.* § 1328(b). This provision permits the court to grant a discharge to a chapter 13 debtor who is unable to complete a plan (1) if the "failure to complete . . . is due to circumstances for which the debtor should not justly be held accountable;" and (2) if the debtor has paid as much as would have been distributed under a chapter 7 proceeding. *Id.* § 1328(b)(1)-(2).

[164] *Id.* § 1328(a)(2).

[165] S. 863, 97th Cong., 1st Sess. (1981).

[166] *Id.* § 130.

[167] *In re* Marlow, 3 B.R. 305, 308 (Bankr. Ct., N.D. Ill. 1980). Apparently the author of the opinion, Judge DeGunther, has seen an opinion in which this sentiment was

ignores the existence of the changes proposed in the technical amendments bill.

Two technical arguments have been advanced for limiting the impact of section 1328(a)(2). The first argument begins with section 1325(a)(4), which prohibits confirmation of a chapter 13 plan which would distribute less to creditors than they would receive if the case were a chapter 7 liquidation.[168] This test is frequently called the "best interests of creditors" test. Since the comparable chapter 7 liquidation could not affect a non-dischargeable claim listed in section 523(a),[169] to permit discharge under chapter 13 of such claims obviously would not be in the "best interests of creditors." Therefore, a chapter 13 plan proposing to discharge non-dischargeable debts should not be confirmed. Bankruptcy Judge Pusateri of Kansas has accepted this argument in *In re McMinn.*[170]

The argument was rejected by Judge DeGunther of the Northern District of Illinois in *In re Marlow*[171] and by Judge Flowers of the Southern District of West Virginia in *In re Cole.*[172] Both judges held that the "best interests of creditors" test did not refer to what was to be "received" by a creditor in the chapter 13 proceeding, as compared with what would be "received" in a chapter 7 liquidation.[173] Rather, the language in section 1325(a)(4) required analysis of what a creditor "would be paid" in the two situations.[174] To quote Judge Flowers: "It is difficult to construe the continuing right to pursue the debtor as something 'paid' in chapter 7 liquidation."[175] Nevertheless, both courts rejected chapter 13 plans proposing to discharge debts not dischargeable under section 523(a).[176] Such plans were held to violate the "good faith" requirement of section 1323(a).[177]

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[168] 11 U.S.C. § 1325(a)(4) (Supp. III 1979).

[169] *Id.* § 523(a).

[170] 4 B.R. 150, 153 (Bankr. Ct., D. Kan. 1980).

[171] 3 B.R. 305 (Bankr. Ct., N.D. Ill. 1980).

[172] 3 B.R. 346 (Bankr. Ct., S.D.W. Va. 1980).

[173] Marlow, 3 B.R. at 308; Cole, 3 B.R. at 350.

[174] Marlow, 3 B.R. at 308; Cole, 3 B.R. at 350.

[175] Cole, 3 B.R. at 350.

[176] Marlow, 3 B.R. at 308-09; Cole, 3 B.R. at 351.

[177] 11 U.S.C. § 1325(a)(3) (Supp. III 1979).

Judge Flowers found the plan in *Cole* to be "subjectively" lacking in good faith where the debtor's only significant debt was owed to a man the debtor had assaulted.[178] In *Marlow*, Judge DeGunther ruled that where the debtor proposed to distribute only one percent to unsecured creditors, and where certain debts were allegedly non-dischargeable, the "good faith" requirement had not been met,[179] and Judge Pusateri, in *McMinn*, relied upon a similar "good faith" analysis.[180]

Judge Eaton of the Southern District of Mississippi has expressly rejected this "good faith" argument, however, stating that "[t]he argument that the plan is not filed in good faith is warrantless, for the debtors are merely taking advantage of a law which Congress enacted."[181] On the other hand, Judge Eaton has not rejected the "best interest of creditors" test: "Further, the Court finds that the unsecured creditors would be paid nothing on their claims if the debtors in the above-styled cases were liquidated. Therefore, it is concluded that the plans filed, by the debtors herein, . . . meet all of the . . . requirements of sections . . . 1328 and 1325 . . . ."[182]

The courts that have denied discharges in chapter 13 on otherwise non-dischargeable debts have arguably reached the correct result. Certainly, debts non-dischargeable in chapters 7 or 11 should not be dischargeable in chapter 13. Congressional intent—in the form of a technical amendments bill—is clear, just as the equities involved are clear. Nevertheless, the present statutory language exists and clearly permits such discharge. The practitioner must be aware of this issue and its ramifications, whether he represents creditors affected by the problem or debtors seeking to take advantage of it.

C. *Involuntary Bankruptcy*

A debtor facing serious financial problems will often refuse to face reality. In appropriate cases, such a debtor's creditors may eventually tire of traditional attempts to collect their debts and decide to file an involuntary petition under section 303 of the Code.[183] An attorney representing such creditors must first determine whether the debtor can be an involuntary bankrupt. Then, the attorney must determine whether his clients (or client, in the appropriate case) can file an involuntary petition.

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[178] Cole, 3 B.R. at 351.

[179] Marlow, 3 B.R. at 308-09.

[180] McMinn, 4 B.R. at 152-53.

[181] *In re* Eichelberger, 6 B.R. 705, 708 (Bankr. Ct., S.D. Miss. 1980).

[182] *Id.*

1. Debtors Who May Not Be Involuntary Bankrupts

There are three classes of debtors that may not be adjudicated involuntary bankrupts. Section 303(a) permits filing only against a "person."[184] Since "person" is defined to include any "individual, partnership and corporation" but not any governmental unit, proceedings against governmental units are excluded.[185] Section 303(a) also expressly excludes from its scope farmers and corporations that are not "moneyed, business, or commercial corporation[s]" (*i.e.*, nonprofit corporate entities).[186]

The Bankruptcy Code does not exclude "wage earners" from its involuntary provisions, as did the Bankruptcy Act.[187] A farmer, as the term is used in this section, means "a person [receiving] more than 80 percent of such person's gross income during the taxable year preceding . . . [the petition] from a farming operation owned or operated by such person."[188] A "farming operation" is also defined to exclude manufacturing and processing of agricultural products.[189] Nothing in section 303 or the definitions limits the application of the term "farmer" to natural persons (*i.e.*, "individuals" in Code terminology).[190] Therefore, any "person" engaged in farming, whether a partnership, corporation, or individual, is free from the threat of an involuntary petition.

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[183] 11 U.S.C. § 303 (Supp. III 1979).

[184] *Id.* § 303(a).

[185] *Id.* § 101(30). For a discussion of this section's effect on involuntary municipal bankruptcies, see note 78 *supra*.

[186] 11 U.S.C. § 303(a) (Supp. III 1979).

[187] *Id.* § 22(b) (1976) (current version at 11 U.S.C. § 303(a) (Supp. III 1979)).

[188] *Id.* § 101(17) (Supp. III 1979).

[189] *Id.* § 101(18).

[190] *Id.* § 101(30).

2. Creditors Permitted to Initiate Involuntary Petitions

Creditors who are permitted to commence involuntary proceedings are described in section 303(b).[191] Such creditors must hold claims that are not contingent and that are unsecured. Three or more creditors with claims aggregating at least $5,000 may file an involuntary petition. If there are twelve or fewer non-contingent, unsecured creditors, then any one creditor with a claim for $5,000 or more may file the petition.[192] These requirements are not jurisdictional and are waived if the debtor does not controvert the involuntary petition.[193]

If the debtor is a partnership special rules apply, although the numerical requirements apply where the involuntary petition is initiated by general creditors. If the petition is filed by only one of the general partners, however, that is sufficient,[194] irrespective of agreements or state law to the contrary.[195] Also, where the involuntary debtor is a partnership, and an "order for relief"[196] has been entered as to all its general partners, any general partner, any trustee of a general partner, or any holder of a claim against the partnership may file an involuntary petition against the partnership.[197]

Where the debtor is a foreign entity involved in foreign proceedings similar to bankruptcy, a representative of the foreign estate may file an involuntary proceeding in order to administer assets in this country.[198]

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[191] *Id.* § 303(b)(1)-(4).

[192] *Id.* § 303(b)(1)-(2). Determination of whether a debt is secured or unsecured is controlled by § 506.

[193] Section 303(b) should be interpreted as overruling Commercial Credit Corp. v. Skutt, 341 F.2d 177 (8th Cir. 1965), and similar cases in which the trustee was permitted to challenge an involuntary petition on the basis of the number of creditors or amount of debt involved.

[194] 11 U.S.C. § 303(b)(3)(A) (Supp. III 1979).

[195] 124 CONG. REC. H11,091 (daily ed. Sept. 28, 1978).

[196] The Code substitutes "order for relief" for "adjudication." An "order for relief" is defined at 11 U.S.C. § 102(6) (Supp. III 1979). *Id.* § 301 states that "commencement of a voluntary case under . . . this title constitutes an order for relief," making the order equivalent to adjudication under the Bankruptcy Act. Compare *id.* § 1(12) (1976) (defining "date of adjudication") (repealed 1978).

[197] *Id.* § 303(b)(3)(B) (Supp. III 1979).

[198] *Id.* § 303(b)(4). Of course, the foreign entity against whom the petition is filed must be qualified under § 109(a)-(b). *See* note 102 *supra.*

Where only one creditor files an involuntary petition, the determination whether a debtor has twelve or fewer creditors becomes important. Creditors whose claims may be avoided under one of the sections of the Code are not counted, nor are employees of the debtor. Further, "insiders" are not counted.[199] "Insiders" are relatives of individual debtors or relatives of general partners of partnership debtors, partners and partnerships of the debtor, and corporate entities of which the individual debtor is either a director, officer, or controlling person.[200] Where the debtor is a corporation, directors, officers, or controlling persons and relatives of all such persons are insiders.[201]

3. Summary

In sum, these are the clients for whom bankruptcy is not available: Debtors who are not residents of or not doing business in the United States, trusts, estates, governmental units other than municipalities, and domestic and foreign banks, thrift institutions, and insurance companies doing business in the United States. Other debtors unable to secure discharges in bankruptcy are persons who have been discharged under chapters 7, 11, or 13, or in proceedings under the Bankruptcy Act. Two exceptions are important and must be kept in mind. Any individual discharged under any provision can file again within six years under chapters 11 and 13, if he otherwise qualifies for the protection of those chapters. Also, any individual who pays seventy percent of his debts in a good faith attempt to complete a chapter 13 plan, or any person who completes a chapter 13 plan under which his creditors are paid one hundred percent may file a chapter 7 or 11 proceeding at any time thereafter. Finally, although the debtor may be dischargeable, his debts may survive bankruptcy. Those debts are listed and described in section 523(a).

Creditors who may file involuntary bankruptcy petitions are limited to those who, either individually or in groups of three or more, can assert unsecured, noncontingent claims of $5,000 or more against debtors who are not farmers or nonprofit corporations. One creditor cannot act alone unless the debtor involved has twelve or fewer creditors.

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[199] 11 U.S.C. § 303(b)(2) (Supp. III 1979).

[200] *Id.* § 101(25).

[201] *Id.*

After determining that a bankruptcy petition can be filed, or that a bankruptcy petition filed for an otherwise qualified debtor will discharge that debtor and his debts, the attorney must next consider exactly what benefits, if any, the petition will provide.

D. *Benefits Provided by Bankruptcy*

Congress, acting under the exclusive grant of authority found in the Constitution,[202] has created a bankruptcy system which proposes "either to rehabilitate a financially distressed debtor or to assemble and liquidate his assets for distribution to creditors."[203] Whatever the result intended:

> [T]he nature of bankruptcy is to sort out all of the debtor's legal relations with others, and to apply the principles and rules of the bankruptcy laws to those relationships. Bankruptcy is mainly a procedural device, prescribing the method of accomplishing rehabilitation or liquidation, but generally leaving undisturbed legal relationships that existed before bankruptcy . . . .[204]

Where the debtor is an individual, and chapter 7 liquidation is elected, there is a third purpose—providing the debtor with a financial "fresh start"[205] by discharging all eligible debts.[206] In proceedings under chapter 11 or 13, a similar "fresh start" results if the plan of reorganization or arrangement is confirmed.[207]

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[202] U.S. CONST. art. I, § 8, cl. 4.

[203] H.R. REP., *supra* note 17, at 10.

[204] *Id.*

[205] S. REP., *supra* note 106, at 7. The "fresh start" is not available to corporations or other entities eligible to file chapter 7 petitions, for to permit such would "promote trafficking in corporate shells [or partnership shells], a form of bankruptcy fraud." *Id.*

[206] *See* note 131 *supra* ("fresh start" as goal).

[207] Confirmation of a chapter 11 plan discharges debts treated by the plan if (a) the creditors accept the plan or (b) the court confirms the plan over creditor objection. The Code permits confirmation over creditor objection if certain tests are met. 11 U.S.C. §§ 1129, 1141 (Supp. III 1979); *see* note 59 and accompanying text *supra* ("cram down"

Whether the "fresh start" sought by the debtor and his attorney involves rehabilitation or liquidation, the initial impact of the filing of a voluntary petition will be the same in all cases. First, the filing of the petition establishes the date around which many of the remedies and rules of the Code revolve.[208] Further, the filing of the petition invokes the protection or power of the bankruptcy court. From the date of filing until dismissal, confirmation, or discharge, all the debtor's assets are subject to the jurisdiction of the bankruptcy court, irrespective of where those assets are located or in whose possession they may be found.[209]

Perhaps the most important result of invoking the jurisdiction of the bankruptcy court is the automatic stay provision of section 362, which "operates as a stay, applicable to *all entities*"[210] and forbids the continuation or initiation of most civil proceedings for the collection of debts.[211] The availability of this remedy, coupled with the section 541 jurisdictional grant of control of all property of the debtor (the "estate"),[212] means that the filing of a bankruptcy petition effectively insulates most of the debtor's property from most of his creditors until an orderly liquidation can be established under chapter 7 or reorganization is attempted under chapter 11 or 13. The stay gives a "breathing space," and the broadened jurisdictional grant makes the stay

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plan).

Completion of a chapter 13 plan justifies discharge under 11 U.S.C. § 1328(a) (Supp. III 1979). A good faith attempt to complete a plan will support a discharge if creditors have received as much or more than would have been distributed if the case had been a chapter 7 liquidation. *Id.* § 1328(b).

[208] 11 U.S.C. §§ 362(a), 541(a), 544(a), 547(b)(4) (Supp. III 1979). Where creditors are not hammering down the debtor's door, the debtor and his attorney may wish to time the filing of the petition with these provisions in mind. For example, under § 547(b), the trustee may not avoid preferential transfers made more than 90 days before the date of the petition unless the transfer was made to an "insider." *Id.* § 547(b)(4)(A). Transfers to "insiders" may not be attacked if more than one year old. *Id.* § 547(b)(4)(B). If the debtor wishes to protect such transfers, the date of the filing of his petition becomes very important. For a discussion of the term "insider," see notes 199 through 201 and accompanying text *supra*.

[209] 11 U.S.C. § 541 (Supp. III 1979).

[210] *Id.* § 362(a) (emphasis added).

[211] *Id.* § 362(a)(1)-(8).

[212] *Id.* § 541(a); *cf.* 28 U.S.C. § 1471(c)-(e) (Supp. III 1979) (jurisdictional grant to bankruptcy courts). For additional discussion of bankruptcy court jurisdiction, see notes 231 through 233 and accompanying text *infra*.

meaningful and effective.

1. The Automatic Stay

Section 362[213] creates an automatic stay rule applicable to all chapters of the Code and continues the automatic stay policy of the pre-Code Rules of Bankruptcy Procedure.[214]

Congress felt that the automatic stay was a necessary and crucial provision for the Code:

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally. A race of diligence by creditors for their debtor's assets prevents that.[215]

The automatic stay can be and frequently is invoked by the filing of a petition while creditors are conducting foreclosure sales or attempting to repossess assets. The stay cuts off any selling, buying, repossessing, adjudicating, or demanding creditor.

Section 362(a)[216] lists eight types of proceedings stayed. In brief, the eight encompass most civil actions to secure and enforce a judgment and most civil proceedings, whether judicial or not, to collect debts and judgments.[217] Also stayed are acts designed to perfect or create liens.[218] Even collection letters and telephone calls are stayed.[219]

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[213] 11 U.S.C. § 362 (Supp. III 1979).

[214] *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2685 (1978). See R. BANKR. P. 144, 401, 601, 1243, and 13-401 for the stay rules applicable under the Bankruptcy Code.

[215] H.R. REP., *supra* note 17, at 340.

[216] 11 U.S.C. § 362(a) (Supp. III 1979).

[217] *Id.* § 362(a)(1)-(3), (7), (8).

All legal actions against the debtor are not stayed, however. Section 362(b)[220] exempts from the stay all criminal and certain key civil proceedings. Civil proceedings which may continue include: (1) "Collection of alimony, maintenance or support from property that is not property of the estate;"[221] (2) the acts necessary to perfect a security interest under article 9 of the Uniform Commercial Code where that article has permitted a ten-day grace period for filing a financing statement;[222] (3) commencement, continuation, and enforcement of matters within the police or regulatory power of a governmental unit, although money judgments arising in such a context are stayed;[223] and (4) issuance of tax deficiency notices.[224]

Other civil proceedings not stayed affect less typical situations, such as commodity brokerage[225] and foreclosure of certain mortgages by the Department of Housing and Urban Development.[226] The relief generated by the automatic stay may be short-lived. Creditors seeking relief may file under section 362(d), and relief will be granted for cause shown after notice and a hearing.[227] Usually, even where relief is granted, the automatic stay does generate the "breathing spell" intended by Congress. This gives a debtor or trustee the opportunity to examine and consolidate the assets of the estate.

2. The Estate

The bankruptcy estate comes into existence when the petition is filed.[228] It consists of all legal and equitable interests owned by the debtor in any property as of the date of filing, "wherever that property may be located."[229] In a limited number of cases, property subsequently acquired by the debtor will be included, along with property that the debtor might have transferred to others prior to the date of the petition.[230]

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[218] *Id.* § 362(a)(4)-(5).

[219] *Id.* § 362(a)(6) stays "*any act* to collect, assess, or recover a claim . . . that arose before commencement of the case." (emphasis added).

[220] *Id.* § 362(b).

[221] *Id.* § 362(b)(2).

[222] *Id.* §§ 362(b)(3), 546(b).

[223] *Id.* § 362(b)(4)-(5).

[224] *Id.* § 362(b)(8).

[225] *Id.* § 362(b)(6).

[226] *Id.* § 362(b)(7).

[227] *Id.* § 362(d). Relief from the stay is usually a complicated and lengthy process in chapter 11 or 13 cases and is an issue that arises after the filing of the petition. Such issues are beyond the scope of this article.

The use of the phrase "wherever . . . located"[231] gives the bankruptcy court jurisdiction over property owned by the debtor located outside the geographical bounds of the federal district where that court sits. That grant, together with the increased jurisdictional powers granted to the bankruptcy court,[232] empowers the court to adjudicate all claims concerning such property, whatever the nature of the claim and without reference to the status of the claim. Thus, even if the jury is out in a tort case filed by or against the debtor, the bankruptcy court can take the case and adjudicate the claim. This makes possible consolidation of all claims by or against the debtor in one case. The bankruptcy court may, however, abstain in appropriate cases.

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[228] *Id.* § 541(a).

[229] *Id.*

[230] *Id.* § 541(a)(3)-(7).

[231] *Id.* § 541(a).

[232] 28 U.S.C. § 1471 (Supp. III 1979) describes the jurisdictional scope of the Code bankruptcy courts:

> (a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.
>
> (b) Notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11 or arising in or related to cases under title 11.
>
> (c) The bankruptcy court for the district in which a case under title 11 is commenced shall exercise all of the jurisdiction conferred by this section on the district courts.
>
> (d) Subsection (b) or (c) of this section does not prevent a district court or a bankruptcy court, in the interest of justice, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11. Such abstention, or a decision not to abstain, is not reviewable by appeal or otherwise.
>
> (e) The bankruptcy court in which a case under title 11 is commenced shall have exclusive jurisdiction of all of the property, whereever [*sic*] located, of the debtor, as of the commencement of such cases.

Never again will bankruptcy practitioners and judges need to wrestle with the concepts of plenary and summary jurisdiction.

Considerations of judicial economy indicate that few cases would be taken from state courts where the process of adjudication had begun. Almost certainly, no case would ever be taken away from a jury.[233]

The new definition for property of the estate eliminates the problems which existed under prior statutory and case law concerning concepts such as "transferability"[234] and "rooted in the pre-bankruptcy past."[235] Also, the definition includes exempt property, which is thereafter released.[236]

Only two forms of property not in existence at the time the petition is filed fall into the estate—inheritances or property settlements and certain forms of income. Section 541(a)(5)[237] provides that property acquired within 180 days after the petition, which would normally not be a part of the estate, will be included in the estate if the property was acquired: (1) "by bequest, devise, or inheritance;"[238] (2) "as result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree;"[239] or (3) by the debtor "as a beneficiary of a life insurance policy or of a death benefit plan."[240]

The estate also acquires the debtor's interest in "[p]roceeds, products, offspring, rents and profits of or from property of the estate."[241] In chapter 7 cases, earnings of the individual debtor generated by work done after the petition are excluded from the estate.[242] However, earnings due for work done prior to the petition, accrued vacation pay and the like, are property of the estate.[243] Earnings naturally fall into the chapter 13 estate,[244] since that chapter proposes to use the individual debtor's income to adjust his debts.

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[233] *See* note 232 *supra.*

[234] *See, e.g.,* Segal v. Rochelle, 382 U.S. 375, 381-85 (1966) (potential claims for loss-carryback tax refund transferable).

[235] *See, e.g.,* Kokoszka v. Belford, 417 U.S. 642, 647 (income tax refund is property), *rehearing denied,* 419 U.S. 886 (1974).

[236] 11 U.S.C. § 522(b) (Supp. III 1979).

[237] *Id.* § 541(a)(5).

[238] *Id.* § 541(a)(5)(A).

[239] *Id.* § 541(a)(5)(B).

[240] *Id.* § 541(a)(5)(C).

[241] *Id.* § 541(a)(6).

[242] *Id.*

[243] Thus, cases such as Lines v. Fredrick, 400 U.S. 18, 20 (1970) (per curiam), which held that accrued but unpaid vacation pay did not pass to a trustee, are overruled by statute.

There is no mention of the earnings of an individual chapter 11 debtor, but logic indicates that an individual involved in chapter 11 would need to devote his earnings to funding the plan. Thus, circumstances would probably dictate that his earnings would fall into the estate. Nevertheless, there is no such requirement, and an individual chapter 11 debtor with income from sources outside the chapter 11 estate might be able to assert the earnings exclusion of section 541(a)(6).[245] Finally, the estate includes property which the debtor has transferred to others but which may be recovered by the trustee under the various provisions dealing with avoidable preferences and fraudulent conveyances.[246]

Exemption of property by the individual debtor,[247] so that he will have the bare minimum necessary for a "fresh start," occurs after the filing of the petition, even though the schedules filed with the petition require the debtor to list property which he claims to be exempt.[248]

3. Exempt Property

a. Availability of Property to Exempt for the Debtor's "Fresh Start"

An analysis of the availability of property eligible for exemption will often help to determine whether an individual debtor should elect chapter 7 or chapter 13, for most, if not all[249] individual consumer debtors are restricted to those chapters.

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[244] 11 U.S.C. § 1306(a)(2) (Supp. III 1979).

[245] *Id.* § 541(a)(6). The failure of chapter 11 to treat the earnings of individuals does provide support for Judge Lavien's conclusion that Congress did not intend to permit consumer chapter 11 cases. *See* notes 121 through 123 and accompanying text *supra.*

[246] 11 U.S.C. § 541(a)(3)-(4) (Supp. III 1979).

[247] *Id.* Section 522(a) makes exemptions available only to individual debtors. Exempt property is considered necessary to enable the bankrupt individual to get his "fresh start"; without exempt property, the naked bankrupt, along with his dependents, would be faced with one of two alternatives: starvation or the public dole.

[248] *See* INTERIM R. BANKR. P. Form 6, Schedule B-4.

[249] *See* notes 44 through 75 and accompanying text *supra.*

If the debtor files under chapter 7, he surrenders to his secured creditors all collateral subject to their claims,[250] surrenders all non-exempt property to the trustee for liquidation and distribution of proceeds to creditors, and retains any remaining exempt property for his "fresh start." If all the property which would ordinarily be exempt has been pledged as collateral to secured creditors, the chapter 7 debtor could have nothing left for the new beginning. Where chapter 13 is selected, the debtor retains all his property, pays secured creditors in full, pays some percentage to unsecured creditors under a court approved plan,[251] and is discharged from the balance of his unsecured debt.

An individual debtor with few or no secured creditors would be best advised to use chapter 7, exercising the property exemptions available and discharging his unsecured debt. A debtor with many secured creditors, who would probably lose his automobile, furniture, and possibly his home, should consider using chapter 13.

Unfortunately, the decision is not that simple in most cases. The debtor's attorney must also consider several other provisions of the Code. For example, assume that a debtor has purchased an automobile on credit, giving a security interest to secure repayment. This is his only secured debt. Should he file under chapter 13 in order to retain possession? Not necessarily. He may file under chapter 7 and then negotiate with the creditor to reaffirm the debt and lien under section 524(c).[252] Although the court must approve most reaffirmation agreements, approval should pose no problem where reaffirmation enables the debtor to retain possession and use of an automobile or other property, particularly where the discharged debtor would need to purchase such property if he lost it during the bankruptcy.[253] If payments on a secured debt are current or can be brought current and the debtor continues to make installment payments following the filing of the petition, creditors should be receptive to a request for reaffirmation.

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[250] 11 U.S.C. § 522(f)(2) (Supp. III 1979) provides an exception to this rule; *see* note 259 and accompanying text *infra.*

[251] *See* notes 67 through 74 and accompanying text *supra* (chapter 13 cases).

[252] 11 U.S.C. § 524(c) (Supp. III 1979).

[253] The court must investigate reaffirmations not involving debts secured by realty and determine that reaffirmation will not impose undue hardship on the debtor or his dependents and is in his best interests. Alternatively, the court may approve reaffirmation where the reaffirmation was "entered into in good faith . . . in settlement of litiga-

Of course, where the value of the collateral is much less than the outstanding balance, the debtor should not be advised to reaffirm. Rather, he should attempt to use the redemption provision, section 722. The right to redemption is not waivable and permits a debtor in chapter 7 to redeem tangible personalty subject to lien. Only property "intended primarily for personal, family or household use"[254] is redeemable, and the property must be either exempt or have been abandoned by the trustee. The trustee generally abandons to the secured creditor property subject to a security interest if the property cannot be sold for more than the "allowed secured claim" against it. If the property in question qualifies, the debtor may redeem by paying to the secured creditor "the amount of the allowed secured claim."[255]

The phrase "allowed secured claim" refers to a determination made concerning all secured claims under section 506.[256] Under the provisions of section 506, the value of a secured claim is determined by reference to the value of the collateral, so that where the collateral is worth less than the claim, the allowed secured claim is the value of the collateral, and the balance due becomes an unsecured claim.[257]

b. *Section 522(f)*

Certain liens and secured claims, which would ordinarily strip the debtor of exempt property, may be disallowed. First, all judicial liens filed against exempt property fail in bankruptcy

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tion" concerning dischargability or redemption. *Id.* § 524(c)(4).

Reaffirmation agreements are treated extensively by the local rules in both Mississippi districts. *See* LOCAL R. BANKR. P., S.D. MISS., 1(10), 2; *id.*, N.D. MISS., 12. See Appendix *infra* for such local rules.

[254] 11 U.S.C. § 722 (Supp. III 1979).

[255] *Id.*; *see* LOCAL R. BANKR. P., S.D. MISS., 1(6), (10). See Appendix *infra* for such local rule.

[256] 11 U.S.C. § 506 (Supp. III 1979).

[257] *Id.*

under section 522(f)(1).[258] This rule is not new. After all, state exemption laws merely create property exempt from levy under judicial proceedings. Section 522(f)(2) goes further. That section avoids any lien which is:

> a nonpossessory, nonpurchase-money security interest in any—
>
> (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments, or jewelry that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor;
>
> (B) implements, professional books, or tools, of the debtor or the trade of a dependent of the debtor; or
>
> (C) professionally prescribed health aids for the debtor or a dependent of the debtor.[259]

Although the section is very useful, it is limited in application to the types of property listed—household furnishings, goods, apparel, etc. No other types of property are protected by the provision.[260]

The constitutionality of a retroactive application of section 522(f)(2) has been challenged in a number of recent bankruptcy proceedings. Creditors have begun to argue that the application of the section to interests arising prior to either the passage of the Code (November 6, 1978) or the effective date of the Code (October 1, 1979) would be an unconstitutional taking of property without due process in violation of the fifth amendment.[261]

The bankruptcy courts have taken three approaches to this fifth amendment issue. Some courts have upheld the constitutionality of the statute without reservation.[262] Other courts have declared any retroactive application of the statute to the period before the enactment of the statute to be unconstitutional. Thus, any lien or security agreement effective before November 6, 1978, cannot be affected.[263] Finally, still other courts have held that liens affixed or interests perfected prior to the effective date of the Code, October 1, 1979, are constitutionally protected.[264]

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[258] *Id.* § 522(f)(1).

[259] *Id.* § 522(f)(2). Note that Local R. Bankr. P., S.D. Miss., 4, see Appendix *infra*, requires that the exemption created by 522(f) be claimed by particular reference in Schedule B-4 at the time the schedules are filed. *See* note 359 *infra*.

[260] *See In re* Ruppe, 3 B.R. 60, 61 (Bankr. Ct., D.C. 1980) (movie projector and camera not "household goods"); *In re* Abt, 2 B.R. 323, 326 (Bankr. Ct., E.D. Pa. 1980) (automobile not "household goods").

[261] *See* notes 262 through 266 and accompanying text *infra* (discussing fifth amendment). Other creditors have asserted that the tenth amendment protects their interest in these cases. Unfortunately for these creditors, the tenth amendment prohibits states, not Congress, from passing laws that impair contracts. *See In re* Ambrose, 4 B.R. 395, 398 (Bankr. Ct., N.D. Ohio 1980) (Congress may legislate bankruptcy law while state cannot).

[262] *E.g., In re* Rutherford, 4 B.R. 510, 513 (Bankr. Ct., S.D. Ohio 1980) (§ 522(f)

Among the various approaches taken, that of Bankruptcy Judge Berry of the Western District of Oklahoma is perhaps the least controversial.[265] Judge Berry has decided that retroactive application of section 522(f) to a security interest entered into prior to enactment of the Code would be unconstitutional. He first determined that the Supreme Court had not permitted retroactive application of the Bankruptcy Act or the Chandler Act. The Supreme Court had never reached the issue whether Congress could make bankruptcy laws retroactive. Rather, the Court found that Congress had simply not done so. Applying similar reasoning, Judge Berry concluded that Congress had simply not made the Code retroactive.[266]

Although this is an attractive solution which avoids the troublesome constitutional issue, an argument could certainly be made that the text of the Bankruptcy Reform Act indicates that Congress intended to make the Code retroactive. Section 403 of the Reform Act contains a savings clause making the Bankruptcy Act applicable to cases filed prior to the effective date of the Code (October 1, 1979), and section 402 clearly states that the Code provisions will apply to and control any case filed thereafter.[267] Thus, unless the Code applies retroactively, no

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constitutional).

[263] *E.g., In re* Lucero, 4 B.R. 659, 661 (Bankr. Ct., D.C. 1980) (application of § 522(f) to pre-enactment liens unconstitutional).

[264] *E.g., In re* Head, 4 B.R. 521, 524 (Bankr. Ct., D. Tenn. 1980) (§ 522(f) constitutionally applied to cases filed after Oct. 1, 1979).

[265] *In re* Pierce, No. 80-00033 (Bankr. Ct., W.D. Okla., June 17, 1980) (reported at 51 OKLA. B.J. 2320 (1980)).

[266] *In re* Pierce, No. 80-00033 (Bankr. Ct., W.D. Okla., June 17, 1980) (reported at 51 OKLA. B.J. 2320, 2323 (1980)).

[267] Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 402-403, 92 Stat. 2682 (1978). A similar argument is advanced by the courts in *In re* Rodrock, 3 B.R. 629, 634-35 (Bankr. Ct., D. Colo. 1980), and *In re* Ambrose, 4 B.R. 395, 398-99 (Bankr. Ct., N.D.

bankruptcy law exists to be applied to cases filed after October 1, 1979, which concern transactions entered into before that date.

A more direct assault upon the section can be found in *In re Rodrock.*[268] Relying upon a 1935 decision of the Supreme Court, *Louisville Joint Stock Bank v. Radford,*[269] the bankruptcy court ruled that despite the Constitution's grant of exclusive bankruptcy jurisdiction to Congress, the exercise of that jurisdiction is still limited by the fifth amendment.[270] The *Rodrock* court went on to examine the application of section 522(f). The interest of the disgruntled creditor had arisen prior to enactment (November 8, 1978). The court decided that application of the section to interests arising prior to enactment would result in a taking without due process.[271] *Rodrock* was carefully considered and appears to have been well-briefed, since the United States intervened on behalf of the trustee. The court's conclusion concerning the application of the section to liens or security agreements dated before the passage of the Code deserves consideration.

For a well-reasoned case reaching an opposite result and upholding the constitutionality of the section, the debtor's counsel might refer to *In re Ambrose.*[272] Although the *Ambrose* court recognized the precedential value of *Radford,*[273] it did not find a violation of the fifth amendment:

> Section 522(f) . . . is addressed to the legimate end of protecting the debtor's exemptions, his discharge, and thus his fresh start and the means taken, permitting the debtor to avoid certain liens on certain exempt property, are reasonable and appropriate to that end. For the provisions of the [Code] to violate the Fifth Amendment, they must be so grossly arbitrary and unreasonable as to be incompatible with fundamental

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Ohio 1980).

[268] 3 B.R. 629 (Bankr. Ct., D. Colo. 1980).

[269] 295 U.S. 555 (1935).

[270] 3 B.R. at 632.

[271] *Id.*

[272] 4 B.R. 395 (Bankr. Ct., N.D. Ohio 1980).

[273] *Id.* at 398-99.

law.[274]

Assuming that, under these provisions, there is property available for exemption—property available for that "fresh start"—the debtor and his attorney may also use the Code to decide what property to preserve.

4. Electing an Exemption Statute

The general availability of exemptions for a debtor and his property will frequently be the crucial factor, without any reference to the issue discussed above. Depending upon the state in which the petition is filed, as well as the state where the property is located, a debtor may qualify for two types of exemptions.

Section 522(b) permits debtors to elect either state law exemptions or those provided by section 522(d) of the Code.[275] Section 522(b)(1) also provides that states may elect to prohibit the use of section 522(d).[276] States that have done this include Louisiana and Tennessee.[277] Even where state law has prohibited use of the federal exemptions, however, section 522(f)[278] may still be used to negate non-purchase money liens against property exempt under a state exemption statute.[279]

A bill was introduced in the 1980 Mississippi legislative session to revise the Mississippi exemption statutes, but that bill did not contain provisions prohibiting the use of section 522(d).[280] Generally, state law exemption schemes are more favorable where the debtor has substantial equity in his homestead. For example, Mississippi's homestead exemption is \$30,000.[281] In comparison, section 522(d)(1) exempts only \$7,500 in property used as a residence.[282]

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[274] *Id.* at 401.

[275] 11 U.S.C. § 522(b)(1) (Supp. III 1979). Actually, the election of state or local exemption law will also mean that the debtor will have the protection of certain specific federal exemption statutes. *See* 5 U.S.C. § 8346(a) (1976 & Supp. III 1979) (federal retirement); 38 U.S.C. § 1301(a) (1976) (veterans' benefits); 42 U.S.C. § 407 (1976) (Social Security).

[276] 11 U.S.C. § 522(b)(1) (Supp. III 1979).

[277] LA. REV. STAT. ANN. § 13:3881(B) (West Supp. 1981); TENN. CODE ANN. § 26-2-112 (1980).

[278] *See* notes 258 through 260 and accompanying text *supra*.

[279] *See In re* Boozer, 4 B.R. 524, 527 (Bankr. Ct., N.D. Ga. 1980) (household goods exempt).

[280] The Mississippi Uniform Exemptions Act, H.B. 80-936, Miss. Leg., 2d Sess. (1980). This bill was not passed by the legislature in 1980, but efforts to gain its passage continue.

The federal exemption scheme, however, is much more favorable than most state laws where personalty is concerned. The federal exemption for "household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments" is \$200 in any item. The aggregate value of items is unlimited.[283] Compare the archaic listing of similar items—such as "two head of cows and calves"—in the Mississippi exemption statute.[284]

The easiest way to compare the federal and Mississippi exemption statutes is in tabular form.[285] The following tables compare section 522(d), present Mississippi law, and the exemption revision bill that was introduced in the Mississippi Legislature. Although this bill has not yet been passed by the legislature, efforts to gain passage continue, and its provisions serve as a guide to future legislation.

Table I: The Homestead Exemption

Bankruptcy Code	Mississippi	Mississippi (Proposed)
\$7,500 worth of real or personal property used as a residence by debtor or a dependent of debtor[286]	\$30,000 in land, buildings owned and occupied by the debtor (limited to 160 acres)[287]	\$30,000 in real or personal property used as a residence by debtor or his dependents[288]
May also be applied to burial plots	No provision for burial plots	No provision for burial plots

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[281] MISS. CODE ANN. § 85-3-21 (Supp. 1981).

[282] 11 U.S.C. § 522(d)(1) (Supp. III 1979).

[283] *Id.* § 522(d)(3).

[284] MISS. CODE ANN. § 85-3-1(h)(ii) (Supp. 1981).

[285] This table is based, in part, upon a term paper by Mr. Geary Grimes, a third year law student at the University of Mississippi School of Law. Mr. Grimes submitted the paper in the course entitled "Creditors' Rights" during the Spring Semester, 1980.

[286] The federal exemption applies to any property, personal or real. No homestead declaration is required. 11 U.S.C. § 522(d)(3) (Supp. III 1979). Further, if not used, in full or in part, the balance of the \$7,500 can be used to exempt other assets. *Id.* § 522(d)(5); *see* note 297 and accompanying text *infra*.

Most Americans today have more invested in personalty than in realty. Among the most important items of personal property owned by most debtors are automobiles, yet only the Code provides expressly for an automobile exemption.

Table II: Automobile Exemption

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$1,200 in one automobile[289]	None	None

As noted above, the exemptions generally available for personalty are much better under the Code than under either present or proposed Mississippi law.

Table III: Personalty

A. Household Furnishings, Goods, Wearing Apparel, Appliances, Books, Animals, Crops or Musical Instruments

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$200 in any one item[290] (There is no limit on the aggregate value.)	(a) If "head of a family," (1) either $250[291] or (2) the following enumerated items: 2 work horses or mules, one yoke oxen, 2 cows and calves,	$200 in any item to an aggregate or total value of $5,000[294]

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[287] MISS. CODE ANN. § 85-3-21 (Supp. 1981). The exemption is only available for realty. The debtor need not have declared property as homestead. Mississippi law preserves the exemption in event no selection is made. *Id.* §§ 85-3-27, -31.

[288] Like the federal exemption, it protects all residences, whether personal or real. H.B. 80-936, *supra* note 280, § 5.

[289] 11 U.S.C. § 522(d)(2) (Supp. III 1979).

[290] *Id.* § 522(d)(3).

[291] MISS. CODE ANN. § 85-3-23 (Supp. 1981).

[292] *Id.* § 85-3-1(h)(i)-(xx).

10 head hogs,
20 sheep,
20 goats,
all poultry,
all colts under 3 years raised in Mississippi by the debtor,
250 bushels corn,
10 bushels wheat or rice,
500 pounds pork, bacon, or other meat,
100 bushels cotton seed,
one wagon and one buggy or cart with harnesses for each,
500 bundles fodder,
1,000 pounds hay,
40 gallons sorgum or molasses or syrup,
1,000 stalks sugar cane,
1 molasses mill and equipment not worth more than $250,
2 bridles,
1 saddle,
1 side saddle,
1 sewing machine,
household and kitchen furniture not exceeding $1,200 in value,
all family portraits,
1 mower and rake for cutting hay and grain[292]

(b) In addition, whether head of a family or not, exempt property includes:
all personal libraries, "including pictures and drawings," to the value of $3,000[293]

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[293] *Id.* § 85-3-1(f).

B. Jewelry

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$500 of personal jewelry[295]	None	Any individual items of jewelry worth $200 or less (however, the aggregate value of jewelry exempted must be included in the $5,000 household goods exemption)[296]

C. General Exemption (The "Wild Card")

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$400 in "any item". Further, any unused portion of the residence exemption of $7,500 may be used here for a total possible exemption of $7,900[297]	None	None

D. Tools of the Trade

Bankruptcy Code	Mississippi	Mississippi (Proposed)
$750 in aggregate value in books, professional tools of the trade of debtor or dependent of debtor[298]	Tools of mechanic necessary for his trade, agricultural implements of farmer necessary for two male laborers, implements of laborer	$750 in aggregate value in books, professional tools of trade[300]

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[294] H.B. 80-936, *supra* note 280, § 10(1).

[295] 11 U.S.C. § 522(d)(4) (Supp. III 1979).

[296] H.B. 80-936, *supra* note 280, § 10(1).

[297] 11 U.S.C. § 522(d)(5) (Supp. III 1979). Perhaps the most useful of the federal exemption provisions, this "wild card" can be applied to any asset in which the debtor claims an interest, including cash. *See In re* Upright, 1 B.R. 694, 701-02 (Bankr. Ct., N.D.N.Y. 1979) (cash from trustee's sale of merchandise exempted).

[298] 11 U.S.C. § 522(a)(6) (Supp. III 1979).

	necessary in usual employment, books of student necessary to complete education, all wearing apparel, instruments of surgeons or dentists to $5,000 in value, globes and maps used by teachers. In lieu of the above mentioned items, the debtor may elect to exempt any tangible personal property of a value not exceeding $6,500. This property may include one or more of the above mentioned items, but the total value of exempt property cannot exceed $6,500.[299]	

E. Unmatured Life Insurance Contracts

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Any unmatured life insurance contract owned by debtor.[301] Further, the debtor may exempt up to $4,000 in loan or cash	None	Any unmatured life insurance contract owned by debtor with cash surrender or loan value of $5,000 or less[303]

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[299] Miss. Code Ann. § 85-3-1(a)-(f), (h) (Supp. 1981).

[300] H.B. 80-936, *supra* note 280, § 10(2).

[301] 11 U.S.C. § 522(d)(7) (Supp. III 1979). H.R. Rep., *supra* note 17, at 361, explains this exemption in the following manner:

> This paragraph refers to the life insurance contract itself. It does not encompass any other rights under the contract, such as the right to borrow out the

surrender value in any unmatured life insurance contract which he owned and under which the insured is either the debtor or a person of whom the debtor is a dependent.[302]		

F. Health Aids

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Any health aid "[p]rofessionally prescribed" for debtor or any dependent of debtor[304]	None	All health aids "reasonably necessary" to enable the individual or a dependent to work or to sustain health[305]

G. Wages Earned After Filing

Bankruptcy Code	Mississippi	Mississippi (Proposed)
Wages accrued after the date of the petition of the chapter 7 case are not part of the estate.[306] In chapter 13, wages are not exempt and are part of the estate.[307]	The Code controls treatment of wages and excludes them, even where state exemptions are elected. Outside of bankruptcy, Mississippi has adopted the standards set forth by the Federal	The Code controls bankruptcy cases; outside of bankruptcy the proposed act would use the same rules as the Federal Consumer Credit Act, protecting at least 75% of wages, *etc.*[310] Where support

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loan value. Because of this provision, the trustee may not surrender a life insurance contract, which remains the property of the debtor if he chooses the Federal exemptions.

[302] 11 U.S.C. § 522(d)(8) (Supp. III 1979).

[303] H.B. 80-936, *supra* note 280, § 9.

[304] 11 U.S.C. § 522(d)(9) (Supp. III 1979).

[305] H.B. 80-936, *supra* note 280, § 7(b).

[306] 11 U.S.C. § 541(a)(6) (Supp. III 1979).

[307] *Id.* § 1306(a)(2).

	Consumer Credit Act,[308] protecting at least 75% of *disposable* income.[309]	orders are involved, 50% of disposable income may be garnished.[311]

H. Other Payments Due the Debtor

Bankruptcy Code	Mississippi	Mississippi (Proposed)
1. Limited to Amount Necessary to Support Debtor or Dependents		
Alimony, support and maintenance payments,[312] pensions and the like paid on illness, death, or retirement,[313] wrongful death benefits paid to debtor as dependent of deceased,[314] life insurance paid on life of person of whom debtor a dependent,[315] payments to compensate debtor or person of whom debtor was dependent for loss of future earnings[316]	None	Benefits for medical, surgical or hospital care used to pay for care of debtor or dependent of debtor.[317]
2. Limited to Specified Amount		
Up to $7,500 paid to debtor or person of	$50,000 in life insurance proceeds	$10,000 in proceeds from judg-

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[308] 15 U.S.C. § 1672(b) (1976).

[309] Miss. Code Ann. § 85-3-4 (Supp. 1981).

[310] H.B. 80-936, *supra* note 280, § 5(2). The proposed statute treats alimony and separate maintenance as wages. *Id.* § 5(a)(1).

[311] *Id.* § 5(3)(b).

[312] 11 U.S.C. § 522(d)(10)(D) (Supp. III 1979).

[313] *Id.* § 522(d)(10)(E).

[314] *Id.* § 522(d)(11)(B).

[315] *Id.* § 522(d)(11)(C).

[316] *Id.* § 522(d)(11)(E).

[317] H.B. 80-936, *supra* note 280, § 9(a).

whom debtor is a dependent for personal bodily injury, not including pain and suffering[318]	paid to beneficiaries of deceased debtor[319] $5,000 in life insurance proceeds paid to estate of deceased debtor,[320] personal injury claims of the debtor to maximum of $10,000[321]	ment or insurance for bodily injury or wrongful death of debtor or dependent of debtor,[322] $50,000 in proceeds from life insurance policy paid on death of debtor's spouse or dependent,[323]
3. Unlimited in Amount		
Social Security payments, unemployment benefits, local public assistance,[324] Veteran's benefits,[325] disability or illness benefits,[326] awards under a crime victim reparations act.[327]	Generally speaking, federal benefits such as social security, veteran's benefits, military and federal retirement payments are exempt from levy,[328] as is income from disability insurance[329] State[330] and municipal retirement benefits are generally exempt.[331] Unemployment benefits[332] and	Social Security payments, unemployment benefits,[336] Veteran's benefits,[337] pensions, *etc.*, paid on illness, retirement, and so forth,[338] child support received by the debtor.[339]

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[318] 11 U.S.C. § 522(d)(11)(D) (Supp. III 1979).

[319] MISS. CODE ANN. § 85-3-11 (1972).

[320] *Id.* § 85-3-13.

[321] *Id.* § 85-3-17.

[322] H.B. 80-936, *supra* note 280, § 9(a).

[323] *Id.* § 9(b).

[324] 11 U.S.C. § 522(d)(10)(A) (Supp. III 1979).

[325] *Id.* § 522(d)(10)(B).

[326] *Id.* § 522(d)(10)(C).

[327] *Id.* § 522(d)(11)(A).

[328] *See* note 275 *supra* (federal exemption statutes).

[329] MISS. CODE ANN. § 85-3-1(j)(ii) (Supp. 1981).

	workmen's compensation benefits are exempt,[333] as are alimony or child support paid to the debtor.[334]	
	Where debtor died during the pendency of any suit and such suit was revived by an administrator, any recovery is exempt where the debtor left surviving a spouse, child, father or mother.[335]	
4. Proceeds Due on Sale/Proceeds from Casualty Loss		
None	All proceeds due on sale of or for casualty loss of any exempt property, real or personal,[340] remain exempt.	None

In conclusion, several important points concerning the exemption of assets must be noted. First, the initial election of exemptions may be binding if too much time elapses prior to an attempt to change the election or if prejudice to creditors might result if such new election were to be permitted.[341] Second,

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[330] *Id.* § 25-11-129 (1972).

[331] *Id.* § 21-29-51.

[332] *Id.* § 71-5-539.

[333] *Id.* § 71-3-43.

[334] *Id.* § 85-3-1(k) (Supp. 1981).

[335] *Id.* § 85-3-19 (1972).

[336] H.B. 80-936, *supra* note 280, § 7(c).

[337] *Id.* § 7(e).

[338] *Id.* § 7(f).

[339] *Id.* § 7(g).

[340] MISS. CODE ANN. § 85-3-1(j)(i) (Supp. 1981).

[341] *See In re* Duggan, 4 B.R. 709, 711 (Bankr. Ct., N.D. Tex. 1980) (change of election prohibited). The decision was based on R. BANKR. P. 403, concerning the time within which claims to exemptions are subject to attack. 4 B.R. at 711. R. BANKR. P.

where a joint petition under section 302[342] is filed, two sets of exemptions are available.[343] Third, although a debtor may not mix-and-match his exemptions,[344] there appears to be no reason why a husband and wife, filing jointly, could not each elect a separate scheme, one choosing federal exemptions and the other state exemptions. Finally, the goods claimed to be exempt, their location, and the statute under which the exemption is claimed must be set forth in schedule B-4,[345] which must be filed with the petition.[346]

5. Trustee

The filing of a petition under either chapter 7 or chapter 13 will result in the automatic appointment of a trustee.[347] The

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403(c) provides that if no objection is filed to the trustee's report concerning the debtor's claimed exemptions within 15 days of the filing of that report, the report cannot thereafter be challenged. The rule was not directly on point, but the *Duggan* court felt that it provided the framework for a proper ruling, holding, "At some point the right to switch from one system to another must end and there be some finality to a choice." 4 B.R. at 711.

In *In re* Mertsching, 4 B.R. 519 (Bankr. Ct., D. Idaho 1980), however, the court permitted the debtor to switch from state to federal exemptions, finding the first election to have been improvident and finding no prejudice to creditors. *Id.* at 519. The estate was taxed $50.00 for the additional cost of administration resulting from the extra duties the change imposed upon the trustee. *Id.*

[342] 11 U.S.C. § 302 (Supp. III 1979).

[343] *See In re* Thompson, 2 B.R. 380, 381 (Bankr. Ct., E.D. Va. 1980) (joint debtor entitled to separate exemption).

[344] *See In re* Nichols, 4 B.R. 711, 716 (Bankr. Ct., E.D. Mich. 1980) (debtor may not combine exemptions).

[345] INTERIM R. BANKR. P. Form No. 6.

[346] *See* 11 U.S.C. §§ 301, 303 (Supp. III 1979) (petition required to institute proceedings); *id.* § 521(1) (list of creditors, assets, and liabilities required). R. BANKR. P. 108 requires the filing of statements and schedules within 10 days of filing a voluntary petition, unless the court grants an additional 10 days. Any extension beyond 20 days can only be granted by the court for cause shown.

In their local rules, the Mississippi bankruptcy judges have also provided for the filing of the statements and schedules. *See* LOCAL R. BANKR. P., N.D. MISS., 6 (requirements similar to federal rule); LOCAL R. BANKR. P., S.D. MISS., 1 (same). See Appendix *infra* for such local rules.

In a chapter 13 bankruptcy, INTERIM R. BANKR. P. 13001 requires the filing of a list of exemptions as "if the debtor's estate were [to be] liquidated under Chapter 7."

[347] 11 U.S.C. §§ 701(a), 1302(a) (Supp. III 1979).

filing of a chapter 11 case will not. The chapter 11 debtor-in-possession has many of the powers of a trustee,[348] however, and a chapter 11 trustee will be appointed where a need is shown.[349] Although the power and role of the trustee cannot be overstated, that power is exercised and that role is played out in the months following the filing of the petition and will not be discussed in detail in this article. The existence of the trustee will often determine the election between chapter 7 and chapter 13 and a chapter 11 case. An attorney contemplating the choice between chapter 7 and chapter 13 might find it significant that the chapter 13 trustee's duties include the duty to advise the debtor on nonlegal matters and assist the debtor in performing under the chapter 13 plan.[350]

6. Summary

The stay, the creation of the estate, the ability to elect and specify exemptions, and the appointment of the trustee are important events which occur at the commencement of a bankruptcy proceeding. While each imposes duties upon the debtor, each also provides certain benefits, the most important being the choice of liquidation or reorganization. The debtor's attorney, as he attempts to decide whether to advise filing or some course of action outside bankruptcy, must try to determine whether the benefits outweigh the disadvantages. Once started, it may be impossible to turn back, for the court can refuse to permit a voluntary dismissal.[351]

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[348] *Id.* § 1107(a). "[A] debtor in possession shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter." *Id.*

[349] *Id.* § 1104(a). Cause to appoint a trustee includes fraud, dishonesty, incompetence, or if appointment of a trustee would be in the interests of creditors or equity security holders.

[350] *Id.* § 1302(b)(3).

[351] Under 11 U.S.C. § 305(a)(1) (Supp. III 1979), the court may dismiss a case if "the interests of creditors and the debtor would be better served by such dismissal." Additionally, upon notice and a hearing and for cause shown, a case may be dismissed under §§ 707, 927, 1112(b), 1307(c). Chapter 11 and chapter 13 cases, however, may not be dismissed if continuation is "in the best interest of creditors and the estate." *Id.* §§ 1112(b), 1307(c). Although neither chapter 7 nor chapter 9 imposes such a "best in-

III. FILING THE PETITION

Procedures governing the filing and subsequent conduct of a bankruptcy proceeding are found in four different sources: (1) the Bankruptcy Code; (2) the Rules of Bankruptcy Procedure;[352] (3) the Interim Rules of Bankruptcy Procedure;[353] and (4) Local Rules of Bankruptcy Procedure.[354] The bankruptcy practitioner must be as familiar with the rules as he is with the Code; thus, the following discussion attempts to integrate the various rules with the Code.

A. *The Forms Required*

Filing a voluntary bankruptcy petition, unlike filing a complaint in an ordinary federal civil action, is not a simple matter. Although the petition is, in and of itself, a short, uncomplicated document, the statements and schedules which must also be filed are difficult, detailed, and, all too frequently, confusing. The basic forms are the petition, the statement of affairs, and the schedules. Also filed are two supplementary but necessary items, the required disclosure of attorney's fees and the matrix list of creditors. These are official forms and are available with

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terest" test, the courts will probably adopt some such standard. For example, in *In re* Reynolds, 4 B.R. 703 (Bankr. Ct., D. Me. 1980), the court denied the debtor's motion to dismiss a chapter 7 petition. *Id.* at 704. The court concluded that the debtor had failed to show cause for dismissal required by § 707 of the Code. 4 B.R. at 704. Additionally, the court noted that dismissal might prejudice creditors who had relied upon the petition as filed. *Id.* Thus, the court's holding was at least partially based upon the "best interest" of the creditors test.

[352] The Rules of Bankruptcy Procedure, originally promulgated under the Bankruptcy Act, remain in effect until new rules are proposed and adopted, unless the old rule is in conflict with the Code. *See* Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, § 405(d), 92 Stat. 2685 (1978).

[353] The Interim Bankruptcy Rules were prepared to provide guidance in applying existing bankruptcy rules where appropriate under the new Code and to fill gaps in the present rules created by the new Code. 11 U.S.C.A. INTERIM BANKRUPTCY RULES at III (Sp. Pamph. 1981). It is important to remember that the Interim Rules are only suggestions made by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States, and as such are not authority to be consulted unless adopted by the court. Both Mississippi bankruptcy court districts have adopted the Interim Rules. In the Northern District, however, certain changes have been made. LOCAL R. BANKR. P., N.D. MISS., 2. See Appendix *infra* for such local rule.

[354] The local rules for both Mississippi districts are attached as the Appendix.

any copy of the Interim Rules of Bankruptcy Procedure and in many other semiofficial sources. The Interim Rules also contain other official forms. Because of their complexity, it is strongly recommended that the forms be purchased from a legal stationer. Attempting to copy the forms from another source for use in a case would be difficult, time consuming, and, therefore, expensive.

Bankruptcy proceedings, at least chapter 7 proceedings, are unlike other federal civil cases in another respect. If the forms are completed properly, there will be little or no work for the debtor's attorney to do after the filing. This is not true in the more complex proceedings under chapter 11 or chapter 13, which do require the filing of plans and other documents subsequent to the filing of the petition. Also, chapter 11 and chapter 13 cases will usually require complex and detailed negotiations between the debtor and his creditors.

There are five forms which must be filed to initiate a voluntary bankruptcy—the petition, the statement of affairs, the schedules, the disclosure of attorney's fees, and the matrix list of addresses. In addition, in a chapter 11 case the debtor must provide several special lists of creditors,[355] and a chapter 13 debtor must file a "Chapter 13 Statement."[356]

It is beyond the scope of this article to analyze and annotate the forms in any detail. The new edition of *Collier on Bankruptcy* devotes an entire volume[357] to the various forms and their annotation. Nevertheless, there are special problems which can be highlighted.

1. The Petition

The basic petition form, Official Form No. 1, is quite simple.[358] The second paragraph of the petition requires a statement that the debtor qualifies under the venue provisions, which are simple: The debtor must have had a residence or a principal place of business in the district where the petition is filed during the 180 days preceding the filing.[359] Of course, the debtor and his creditors may waive venue.

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[355] Interim R. Bankr. P. 1007(a).

[356] *Id.* 13001.

[357] 6 W. Collier, *supra* note 97.

[358] Interim R. Bankr. P. Form No. 1.

Paragraph four of the petition must be completed in a chapter 11 or chapter 13 petition. This paragraph simply states that a dated copy of the proposed plan is attached or that the petitioner intends to file a plan pursuant to chapter 11 or chapter 13 of title 11 of the United States Code.

Although the chapter 11 or chapter 13 petitioner is not required to file a plan with the petition,[360] the petitioner may do so and would be well advised to consider doing so if the circumstances permit. In the appropriate case, a debtor might consult with key creditors prior to filing his petition. If his creditors are very hostile, the debtor might not want to attempt a chapter 11 reorganization or chapter 13 arrangement. If the creditors are friendly, the debtor might be able to frame an acceptable plan with creditor's cooperation, and thus conserve the time and energy that typically are involved in the preparation and negotiation of chapter 11 and chapter 13 plans prepared and filed in the post-petition period. Admittedly, few debtors will have this much freedom of action. Most bankruptcies seem to be filed just as the sheriff appears at the door.

Form No. 2[361] is the only other voluntary petition form in use under the Interim Rules, and it is used in joint cases. It presents no special difficulties.

Involuntary cases are initiated using Form No. 9.[362] The form is designed for use where three or more creditors unite to file the petition and will require modification if used by one creditor. If one creditor files the petition, a paragraph should be inserted stating that the debtor has twelve or fewer unsecured creditors.[363]

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[359] 28 U.S.C. § 1472(1) (Supp. III 1979).

[360] 11 U.S.C. § 1121(b) (Supp. III 1979) gives the typical chapter 11 debtor at least 120 days in which to file a plan. If a trustee is appointed or cause is shown, the 120 day period will be shortened. *Id.* § 1121(c)(1)-(d).

The Code itself sets no time limit for filing a chapter 13 plan. *Id.* § 1321. R. BANKR. P. 13-201, however, provides that the plan must be filed within 10 days of the petition, with extensions granted for cause shown, on notice to other parties. Further, a delay in filing a plan is a ground for dismissal or conversion to chapter 7. 11 U.S.C. § 1307(c)(3) (Supp. III 1979).

[361] INTERIM R. BANKR. P. Form No. 2.

[362] *Id.* Form No. 9.

Paragraph four of the involuntary form requires the creditor or creditors filing the petition to state the grounds for involuntary relief. Only two of the old "acts of bankruptcy" remain and either will support the petition.[364] The petitioner or petitioners must allege either that the debtor is not paying his debts as they fall due or that the debtor has suffered the appointment of a receiver or similar custodian during the 120 days preceding the filing of the petition.[365]

Under rule 108,[366] a voluntary petition under chapter 7 may be filed without the accompanying documents if a list of creditors, complete with addresses, is attached to the petition. Nevertheless, the supporting documents must be filed within ten days of the voluntary petition, unless leave of court is granted.[367] An involuntary debtor is not required to file the supplementary documents until ten days after an order for relief is entered.[368]

A chapter 11 petition must be accompanied by a list of the names and addresses of the debtor's ten largest unsecured creditors.[369] This list is necessary so that the court may select and appoint an unsecured creditors' committee without delay.[370]

If this requirement is met, the debtor has fifteen days from the date of filing to tender the other materials, and extensions may be granted for cause shown after notice to other parties. The involuntary chapter 11 debtor also has fifteen days to file his documents, but the period does not begin to run until an order for relief is entered. Extensions may also be granted involuntary debtors for cause shown after notice to the other parties.[371]

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[363] *See* 11 U.S.C. § 303(b)(2) (Supp. III 1979) (if less than 12 holders, any holder may initiate proceeding).

[364] *Id.* § 303(h)(1)-(2).

[365] *Id.; see* INTERIM R. BANKR. P. Form No. 9, ¶ 4 (two grounds of relief indicated).

[366] R. BANKR. P. 108.

[367] The court may grant 10 additional days as a matter of course, but can grant delays beyond the twentieth day only for cause shown. *Id.* 108(b).

[368] An order for relief will be entered unless the debtor controverts the involuntary petition. 11 U.S.C. § 303(h) (Supp. III 1979). If controverted, the petitioner(s) must show one of the two remaining justifications for involuntary bankruptcy. If that showing is acceptable, an order for relief will be entered. *Id.*

Once the order for relief is entered, the debtor has an obligation to file his schedule and statements. *Id.* § 521(1). R. BANKR. P. 108(b) provides the 10-day rule, with the same provisions for extension as in voluntary cases—an added 10 days with leave of court but no further extensions without cause shown, notice, and hearing. If the involuntary debtor fails to cooperate, the rule provides that "the court may order the . . . trustee, a petitioning creditor, or other party in interest to prepare and file any of these papers within such time as the Court shall fix." *Id.*

[369] INTERIM R. BANKR. P. 1007(a)(1).

[370] *See* 11 U.S.C. § 1102(a)(1) (Supp. III 1979) (court-appointed creditor committee).

The times for filing the statement in a chapter 13 case are the same as those for filing in chapter 7—within ten days of the petition, with the court empowered to grant an automatic ten-day extension, but no further extension without cause and notice.[372] As discussed below, the forms used in chapter 13 are somewhat different from those used in chapter 7 and chapter 11.[373] A specialized chapter 13 form is now generally available from legal stationers and should always be used to initiate chapter 13 cases.

2. The Statement of Affairs and the "Chapter 13 Statement"

The documents which must be filed to support the petition are as complex as the petition is simple. The statements of affairs are the most difficult of the supporting documents. There are three versions. In either a chapter 7 or a chapter 11 case, the Interim Rules of Bankruptcy Procedure contain two versions of the statement: Form No. 7, to be used by debtors not engaged in business, and Form No. 8, for business debtors.[374] Chapter 13 debtors must file a "Chapter 13 Statement," a version of Form No. 1-5, from the Rules of Bankruptcy Procedure (the "Chapter XIII Statement"), modified by the additional information required by rule 13001 of the Interim Rules of Bankruptcy Procedure. The "Chapter 13 Statement" includes the material normally included in the schedules of other debtors.[375]

These statements will require the close attention of the debtor and his attorney. All require disclosure of the recent, and sometimes not-so-recent, financial history of the debtor. For example, he is required to provide personal and business financial information necessary to determine the dischargeability of various debts.[376]

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[371] INTERIM R. BANKR. P. 1007(b)-(d).

[372] R. BANKR. P. 13-107(b).

[373] *Compare* INTERIM R. BANKR. P. Form Nos. 7, 8 (chapter 7 or 11 forms) *with* R. BANKR. P. Form No. 13-5 ("Chapter 13 Statement") *and* INTERIM R. BANKR. P. 13001 (same).

[374] INTERIM R. BANKR. P. Form Nos. 7, 8.

[375] *See* note 373 *supra*.

Particular attention should be paid to the questions dealing with payments to creditors and transfers of property to creditors and others.[377] The trustee or debtor in possession will use this information to attach pre-bankruptcy transactions as preferential,[378] fraudulent,[379] or void as against the trustee.[380]

The "Chapter 13 Statement" contains questions similar to those posed by the statement in other cases and, in addition, requires the debtor to schedule his property.[381] A copy of the official form used in chapter XIII cases under the Bankruptcy Act, official Form No. 13-5, may be used if the additional information required by rule 13001 of the Interim Rules is added.[382] Rule 13001 requires that the old form be supplemented with a list of property which would be claimed as exempt if the debtor had filed under chapter 7.[383] Further, if the chapter 13 debtor is engaged in business, the debtor must file Form No. 8, the "Statement of Affairs" for business debtors.[384]

3. The Schedules

Chapter 7 and chapter 11 debtors must file Schedule A, listing debts owed by the debtor, and Schedule B, listing property owned by the debtor. These schedules are set forth as Form No. 6 of the Interim Rules.[385] Similar information must be provided in the "Chapter 13 Statement."[386]

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[376] *See* INTERIM R. BANKR. P. Form No. 7, question 7 and Form 8, question 9 (prior bankruptcies). These questions are relevant to the six-year discharge period found in 11 U.S.C. § 727(a)(8) (Supp. III 1979). *See* note 133 *supra*.

[377] INTERIM R. BANKR. P. Form No. 7, questions 11, 12, 13 and Form No. 8, questions 13, 14, 16.

[378] 11 U.S.C. § 547 (Supp. III 1979).

[379] *Id.* § 548.

[380] *Id.* § 544.

[381] R. BANKR. P. Form No. 13-15.

[382] INTERIM R. BANKR. P. 13001(a).

[383] *Id.* Legal stationers now offer an integrated form.

[384] *Id.* 13001(b).

[385] *Id.* Form No. 6.

Attorneys should pay close attention to Schedules B-2 and B-4.[387] Specificity is required by most courts. Thus, where Schedule B-2(c) requires a list of "[h]ousehold goods, supplies and furnishings,"[388] the court and trustee will expect to find a complete list of major items such as appliances and a fairly complete breakdown of other items by groups (*e.g.*, linens, frozen foods, canned goods, *etc.*). Similar specificity is required in declaring exempt property in Schedule B-4.[389] Schedule B-4 also requires the debtor to list the statutory provision under which he claims the property to be exempt.[390]

A debtor filing in the Southern District of Mississippi must also, in Schedule B-4 and in the "Chapter 13 Statement," indicate any property claimed as exempt by the operation of section 522(f).[391]

4. Disclosure of Attorney's Fees

Section 329 of the Code requires the debtor's attorney to disclose any "compensation paid or agreed to be paid" to the attorney under any agreement entered into within one year of the filing.[392] Section 329 also authorizes the bankruptcy court to determine the reasonable value of the attorney's services and to order the repayment of excessive fees to the estate or debtor.[393] There is no official form used for this disclosure; most attorneys use a commercial form. The form must be filed with a chapter 7 or chapter 13 petition in the Southern District of Mississippi.[394] At the first meeting of creditors, the trustee or interim trustee is required to evaluate the attorney's work product in the context of the fees charged.[395]

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[386] *Id.* 13001; R. BANKR. P. Form No. 13-5.

[387] INTERIM R. BANKR. P. Form No. 6.

[388] *Id.* Form No. 6, Schedule B-2(c).

[389] *Id.* Form No. 6, Schedule B-4.

[390] *Id.*

[391] LOCAL R. BANKR. P., S.D. MISS., 4. See Appendix *infra* for such local rule.

[392] 11 U.S.C. § 329(a) (Supp. III 1979).

[393] *Id.* § 329(b). The bankruptcy courts are not reluctant to act in appropriate cases. *See In re* St. Pierre, 4 B.R. 184 (Bankr. Ct., D.R.I. 1980) (attorney's fee reduced).

[394] LOCAL R. BANKR. P., S.D. MISS., 5. See Appendix *infra* for such local rule.

[395] *Id.*

In chapter 11 cases filed in the Southern District, and in all cases filed in the Northern District, rule 219(b) of the Bankruptcy Rules controls, requiring the filing of the disclosure statement on or before the date set for the first meeting.[396] Judge Eaton, in local rule 5, has specified three factors to be used in evaluating the reasonableness of attorney's fees: "(A) All of the duties of the attorney have been performed pursuant to Local Rule No. 1; (B) All of the duties expected of a competent attorney have been performed; (C) Said compensation is commensurate with the quality of work demanded by this Court."[397] Judge Eaton's local rule 1, referred to above, contains an extensive list of duties which he expects the debtor's attorney to perform before or within a limited period after the date of the filing of the petition.[398] For example, the attorney must review the petition and forms to ensure that all are fully and correctly completed, that all exemptions are claimed, and that all creditors are properly listed.[399]

Bankruptcy Rule 219(c) also lists factors to be considered in determining the compensation to be allowed any attorney:

> (1) GENERAL . . . [T]he court shall give due consideration to the nature, extent, and value of the services rendered as well as to the conservation of the estate and the interests of creditors.
>
> . . . .
>
> (3) ATTORNEY OR ACCOUNTANT. Compensation may be allowed to an attorney or an accountant only for professional services.[400]

5. The Matrix List of Addresses

In order to simplify the task of sending notice to the various creditors and other parties in interest in the bankruptcy proceeding, bankruptcy courts now generally require that the documents filed include a special, separate list of creditors' addresses, together with the address of the debtor's attorney.[401] The form used is called a matrix and is a simple grid of three inch blocks. Names and addresses are typed into blocks; this permits use of photocopy reproduction on sheets of peel-off address labels.

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[396] *Id.*; R. Bankr. P. 219(b).

[397] Local R. Bankr. P., S.D. Miss., 5. See Appendix *infra* for such local rule.

[398] *Id.* 1.

[399] *Id.* 1(1).

[400] R. Bankr. P. 219(c).

The matrix should always be filed with the petition. Where the petition is filed alone, without the schedules and statements,[402] the matrix form should be used to submit the required list of creditors, because this form is necessary for the court to give notice of the filing of the petition to the various creditors.

6. Special Forms and Duties

The Interim Rules and local rules (or practice) may impose special requirements upon the debtor and his counsel. These must always be consulted before filing. The Interim Rules, for example, require the chapter 11 debtor to file a list of his ten largest unsecured creditors as well as a complete list of all creditors, listed by class, and a complete list of all equity security holders.[403] The special requirements of the "Chapter 13 Statement" set forth in interim rule 13001 have already been discussed.[404]

Special duties are also required of the debtor in other cases. For example, where a partnership files bankruptcy, general partners not joining or not served must be notified of the petition within five days.[405] In addition, local practice in the Southern District of Mississippi requires the filing of a "Designation Form" in all cases. That form provides information concerning the nature and size of a case as well as the debtor's county of residence.

The local rules established for the Southern District also require that the debtor's attorney: (1) Review and determine the accuracy of the petition, schedules, and statements;[406] (2) determine the name of the trustee and thereafter assist the trustee, particularly by providing books and records in appropriate cases;[407] (3) immediately initiate the redemption process, under section 722 of the Code, where the debtor so desires;[408] and (4) pursue and protest the debtor's interest in automobiles, as well as give notice to secured creditors of their rights in automobiles and other property.[409] Attorneys also are encouraged to initiate negotiations for reaffirmation agreements concerning automobiles prior to the first meeting of creditors.[410]

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[401] LOCAL R. BANKR. P., S.D. MISS., 13(a). See Appendix *infra* for such local rule.

[402] R. BANKR. P. 108(b).

[403] INTERIM R. BANKR. P. 1007(a)-(b).

[404] *See* notes 374 through 383 and accompanying text *supra*.

[405] INTERIM R. BANKR. P. 1004(b) requires that notice be given by sending such general partner a copy of the petition by "first-class mail postage prepaid to [his] last known address." *Id.* For both voluntary and involuntary cases, this burden lies upon the party filing the petition.

7. Place of Filing, Fees, Copies

The original petition should be filed with the appropriate bankruptcy clerk, in Jackson or Greenville, but both courts accept emergency petitions filed at other federal courthouses in their districts.[411] Abuse of this courtesy is not advised.

The fees required are: Chapter 7 or 13 (including individual and joint petitions), $60; chapter 9, $300; chapter 11 (non-railroad debtor), $200; chapter 11 (railroad debtor), $500.[412] Where the petition is filed by an individual, in either chapter 7, 11, or 13, payments may be made in installments.[413]

The number of copies required varies between the districts, and local rules must always be consulted. For either voluntary or involuntary cases, the interim rules adopted by the Northern District require an original petition and three copies for chapter 7 or 13 and eleven copies for chapters 9 or 11.[414] In the Southern District, Judge Eaton requires an original and two copies of a voluntary chapter 7; he requires the original and five copies in chapters 9 and 11.[415] In chapter 13 cases, the original and two copies of the petition must be filed together with enough copies of the summarized plan to mail a copy to each creditor.[416]

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[406] LOCAL R. BANKR. P., S.D. MISS., 1(1). See Appendix *infra* for such local rule.

[407] *Id.* 1(2)-(3).

[408] *Id.* 1(3)-(5), (10).

[409] *Id.* 1(7)-(9).

[410] *Id.* 2.

[411] LOCAL R. BANKR. P., N.D. MISS., 5. See Appendix, *infra* for such local rule. A similar practice is followed in the Southern District. *See* Joint Announcement by Judge Barney Eaton, III, Bankruptcy Judge for the Southern District of Mississippi, and Harvey G. Henderson, United States Clerk for the Southern District of Mississippi, dated September 20, 1979. See Appendix *infra*.

Both judges have indicated that an emergency petition is one filed to forestall a pending foreclosure, garnishment, attachment, or the like.

[412] 28 U.S.C. § 1930(a) (Supp. III 1979).

[413] *Id.*; INTERIM R. BANKR. P. 1006(b). Local Southern District rules modify this procedure, permitting no more than five installments of $15.00 each. INSTRUCTION FOR PROPERLY FILING PETITIONS, S.D. MISS., No. 4. LOCAL R. BANKR. P., S.D. MISS., 7 provides a special chapter 13 payment procedure, whereby chapter 13 fees not paid at filing will be automatically treated in the chapter 13 plan. *Id.* See Appendix *infra*.

8. Service and Answers in Involuntary Cases

Following the filing of an involuntary petition, the clerk of the bankruptcy court issues a summons for service.[417] Service is made as required by the Federal Rules of Civil Procedure and may be made by any person over eighteen who is not a party.[418] Service must generally be made within ten days of the issuance of the summons.[419]

The answer to an involuntary petition must be filed within twenty days, as provided by rule 12 of the Federal Rules of Civil Procedure, unless the time for answer is shortened by the court.[420]

IV. FROM FILING TO THE FIRST MEETING OF CREDITORS

For a time following the filing of the petition, there is little for the voluntary debtor and his attorney to do. It is during this period that creditors will be given notice, a trustee will be selected, and, in a few cases, a creditors' committee elected. The active, litigious, and all too often acrimonious phase of the case begins at or after the first meeting of creditors—the point at which this article stops. In a few cases, however, the trustee may decide to act or creditors may initiate adversary proceedings before that first meeting. On the other hand, in an involuntary case, this is a very busy period.

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[414] INTERIM R. BANKR. P. 1002(b)(1)-(2), 1003(a).

[415] INSTRUCTIONS, *supra* note 413, No. 14. See Appendix *infra* for such instruction. The instruction makes no distinction between the copies required for voluntary and involuntary petitions.

[416] LOCAL R. BANKR. P., S.D. MISS., 13. See Appendix *infra* for such local rule.

[417] R. BANKR. P. 111.

[418] *Id.* 704(b). Where service by mail is required, see *id.* 111, 704(c).

[419] *Id.* 704(e).

[420] *Id.* 112; INTERIM R. BANKR. P. 1009(b). *See generally* FED. R. CIV. P. 12 (governs answer filing procedure).

A. *Appointment of Trustees*

1. Voluntary Cases

When a voluntary petition is filed under either chapter 7 or 13, the court will appoint a trustee to take charge of the debtor's assets—the estate[421]—and proceed with the case. In a chapter 7 case, the court appoints an interim trustee,[422] who serves until replaced by a trustee elected by the creditors.[423] In most chapter 7 cases, creditors do not request the election, as required,[424] and the interim trustee serves throughout the case. Where creditors do decide to elect their own trustee, the election usually takes place at or after the first meeting of creditors.

Where chapter 7 creditors elect their own trustee, the election is governed by section 702. Only unsecured creditors with "allowable, undisputed, fixed [and] liquidated" claims entitled to distribution may vote.[425] Even claimants meeting these qualifications are barred if they are insiders or if the claim asserted is "materially adverse . . . to the interest of creditors entitled to

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[421] *See* notes 228 through 248 and accompanying text *supra*.

[422] 11 U.S.C. § 701(a) (Supp. III 1979). The court is required to appoint a disinterested person to serve as interim trustee. The appointment must follow the entry of an order for relief. The interim trustee must be selected from the panel of private trustees created by 28 U.S.C. § 604(f) (Supp. III 1979):

> For each bankruptcy court, the Director [of the Administrative Office of the United States Courts] shall name qualified persons to membership on the panel of trustees. The number and qualifications of persons named to membership on the panel of trustees shall be determined by rules and regulations to be adopted by the Director. An individual named to membership on the panel of trustees shall have a residency or office in the State served by the court or in any adjacent State. A corporation named to membership on the panel of trustees shall be authorized by its charter or by law to act as trustee and shall have an office in the State served by the court. The Director on his own initiative may at any time remove for cause a person named to a panel of trustees or remove a trustee appointed from the panel.

[423] 11 U.S.C. § 702(b) (Supp. III 1979). Creditors usually elect a trustee in the larger cases only.

[424] *Id.* § 702(b).

[425] *Id.* § 702(a)(1).

. . . distribution."[426] Those desiring to vote must have filed a proof of their claim prior to the meeting.[427] "[C]reditors holding at least 20 percent in amount" and otherwise qualifed to participate must vote in the election for trustee.[428] For a candidate to be elected, he must receive a majority of the vote, calculated in amount of the claims represented.[429] Otherwise, the interim trustee continues to serve.[430]

There is no election of the trustee in a chapter 13 case. Rather, the trustee is appointed by the bankruptcy court under section 1302, which also describes the chapter 13 trustee's duties in some detail.[431] Where the caseload warrants, a standing trustee for all chapter 13 cases is usually appointed.[432]

The Code presumes that no trustee will be appointed in chapter 11 cases unless there is a compelling need. Section 1104 provides that any party in interest may move for the appointment: "(1) for cause, including fraud, dishonesty, incompetence or gross mismanagement . . . or (2) [i]f such appointment is in the best interest of creditors, . . . equity security holders, and other interests of the estate."[433] If the movant cannot justify the appointment of a trustee, the Code provides a less drastic remedy—the appointment of an examiner "to conduct such investigation of the debtor as is appropriate."[434]

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[426] *Id.* § 702(a)(2)-(3). *See* notes 199 through 201 and accompanying text *supra.*

[427] INTERIM R. BANKR. P. 2003(b)(3).

[428] 11 U.S.C. § 702(c)(1) (Supp. III 1979).

[429] *Id.* § 702(c)(2).

[430] *Id.* § 702(d).

[431] *Id.* § 1302(a). Section 1302(b)-(c) sets forth the duties of the trustee:

> (b) The trustee shall—
>
> (1) perform the duties specified in sections 704(2), 704(3), 704(4), 704(5), 704(6), and 704(8) of this title;
>
> (2) appear and be heard at any hearing that concerns—
>
> (A) the value of property subject to lien;
>
> (B) confirmation of a plan; or
>
> (C) modification of the plan after confirmation; and
>
> (3) advise, other than on legal matters, and assist the debtor in performance under the plan.
>
> (c) If the debtor is engaged in business, then in addition to the duties specified in subsection (b) of this section, the trustee shall perform the duties specified in sections 1106(a)(3) and 1106(a)(4) of this title.

[432] *Id.* § 1302(d)-(e).

[433] *Id.* § 1104(a).

The institution of "receiver" has disappeared from the Code. The Code specifically provides that "a bankruptcy court may not appoint a receiver in a case under" Title 11.[435] According to the Senate Report: "The bankruptcy code has ample provision for the appointment of a trustee when needed. Appointment of a receiver would simply circumvent the established process."[436]

2. Involuntary Cases

In involuntary proceedings under chapter 7, an interim trustee may be appointed before entry of the order for relief. The moving party must show that the appointment is "necessary to preserve the property of the estate or to prevent loss to the estate."[437] Appointment of a trustee in an involuntary chapter 11 proceeding will occur where a need is shown, as in a voluntary case.[438]

3. Limitations on the Bankruptcy Court's Power to Appoint Trustees

All court-appointed trustees must be approved by the Office of the Director of the Administrative Office of the United States Courts.[439] Further, rule 2005(a) of the Interim Rules requires the Bankruptcy Court to limit appointments, stating that "[a]ppointments of trustees and examiners shall be made so that the annual aggregate compensation of any person shall not be disproportionate or excessive, giving proper regard to geographical constraints."[440]

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[434] *Id.* § 1104(b). *See generally id.* § 1106(b) (listing examiner's duties). Among the more significant changes under the Code is § 1109, which stills the voice of the Securities Exchange Commission in bankruptcy cases. The SEC no longer has standing to intervene in bankruptcy cases. *See generally* 5 W. COLLIER, *supra* note 97, ¶ 1109.01 (SEC's role under the Code); Corroto & Picard, *Business Reorganization Under the Bankrutpcy Reform Act of 1978—A New Approach to Investor Protections and the Role of the S.E.C.*, 28 DEPAUL L. REV. 961, 964 (1979) (same).

[435] 11 U.S.C. § 105(b) (Supp. III 1979).

[436] S. REP., *supra* note 106, at 29; *accord* H.R. REP., *supra* note 17, at 316.

[437] 11 U.S.C. § 303(g) (Supp. III 1979); INTERIM R. BANKR. P. 2001. LOCAL R. BANKR. P., N.D. MISS., 7, modifies interim rule 2001. See Appendix *infra* for such local rule.

[438] *See* text accompanying note 433 *supra* (trustee appointment under chapter 11).

[439] *See* note 422 *supra* (trustee appointment under chapter 7).

Together, the statute and rule changes are designed to end cronyism and the "Bankruptcy Ring" described by Congress:

> There is an unusually close relationship between the bankruptcy judges and the bankruptcy bar, especially the debtors' and trustees' bars. They are in frequent contact with the judge as a result of the necessity for the judge's review of the administrative actions of the trustee or debtor in possession. Usually, a trustee is appointed by the bankruptcy judge, and is appointed in numerous cases before the same judge. Debtors' attorneys make frequent appearances in the same court representing numerous different debtors. All of these contacts and relationships have led to a feeling among nonbankruptcy practitioners that there is a "bankruptcy ring" that has an inside track on all bankruptcy matters, including the judges' favoritism . . . .[441]

B. *Duties of the Debtor, His Attorney, and His Creditors Prior to the First Meeting of Creditors; Proceedings In Involuntary Cases*

The local bankruptcy rules in the Southern District of Mississippi require the debtor, his attorney, and any creditors involved to accomplish a great many tasks prior to the first meeting. Rule 1 requires that the attorney for the debtor determine the name of the trustee appointed, and thereafter assist the trustee, such as by delivering any books and records of the debtor to the trustee.[442] Local rule 1 requires the attorney and the debtor to determine what property the debtor may desire to redeem under section 722.[443] Rule 2 requires the debtor desiring to reassume automobile loans to be prepared to do so at the first meeting.[444]

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[440] INTERIM R. BANKR. P. 2005(a). The rule is not applicable to standing chapter 13 trustees. Separate statutory provision is made at 11 U.S.C. § 1302(e) (Supp. III 1979) for their renumeration.

[441] H.R. REP., *supra* note 17, at 95.

[442] LOCAL R. BANKR. P., S.D. MISS., 1(2)-(3). See Appendix *infra* for such local rule.

[443] *Id.* 1(4)-(11). See Appendix *infra* for such local rule. *See* notes 254, 255 and accompanying text *supra*.

[444] LOCAL R. BANKR. P., S.D. MISS., 2. See Appendix *infra* for such local rule.

Creditors in the Southern District are required to be prepared to file for abandonment under section 554 by the first meeting.[445] The procedure for requesting abandonment is somewhat different in the Northern District.[446] Also, during this period a debtor who has been subjected to an involuntary filing and who elects to controvert the involuntary petition will have his status adjudicated by the court. The procedures are set forth at section 303.[447] The petitioning creditor must show that "(1) the debtor is generally not paying [his] debts as such debts become due; or (2) within 120 days before the date of the filing of the [involuntary] petition, a custodian . . . was appointed or took possession [of debtor's assets]."[448] The debtor and petitioning creditor or creditors are not entitled to a jury trial in controverted involuntary cases.[449]

C. *Creditors' and Other Committees*

The Code provides for committees of creditors in both chapter 7 and 11, but not in chapter 13. The chapter 7 creditors' committee may be elected by the same creditors who are permitted to vote for the trustee.[450] The committee will consist of at least three and not more than eleven unsecured creditors.[451] It is empowered to consult with and make recommendations to the trustee concerning the performance of his duties "and submit to the court any question affecting the administration of the estate."[452] The chapter 7 creditors elect their committee at the first meeting.[453]

The chapter 11 creditors' committee, on the other hand, is to be appointed by the court "as soon as practical after the order for relief" is entered.[454] Again, the committee represents unsecured creditors. The Code uses the term "shall appoint," indicating that this appointment is mandatory.[455] The committee is appointed from the seven largest creditors willing to serve.[456] The chapter 11 court may also appoint a committee to represent equity security holders and other creditor groups, such as secured creditors, in appropriate cases.[457]

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[445] *Id.* 3. See Appendix *infra* for such local rule.

[446] Local R. Bankr. P., N.D. Miss., Procedures For Secured Creditors. See Appendix *infra*.

[447] 11 U.S.C. § 303 (Supp. III 1979).

[448] *Id.* § 303(h).

[449] 28 U.S.C. § 1480(b) (Supp. III 1979).

[450] 11 U.S.C. § 702 (Supp. III 1979).

[451] *Id.* § 705(a).

[452] *Id.* § 705(b).

[453] *Id.* § 705(a).

[454] *Id.* § 1102(a)(1).

Chapter 11 committees are granted significant powers,[458] including the power to retain attorneys, accountants, and other agents.[459] Not all qualified creditors may serve on a chapter 11

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[455] *Id.*

[456] *Id.* § 1102(b)(1). The names of these creditors will appear on the list of the 10 largest unsecured creditors, which must be submitted with a chapter 11 petition. *See* text accompanying note 369 *supra.*

[457] 11 U.S.C. § 1102(a)(2) (Supp. III 1979).

[458] 11 U.S.C. § 1103(c) states that:

> A committee appointed under section 1102 of this title may—
>
> (1) consult with the trustee or debtor in possession concerning the administration of the case;
>
> (2) investigate the acts, conduct, assets, liabilities, and financial condition of the debtor, the operation of the debtor's business and the desirability of the continuance of such business, and any other matter relevant to the case or to the formulation of a plan;
>
> (3) participate in the formulation of a plan, advise those represented by such committee of such committee's recommendations as to any plan formulated, and collect and file with the court acceptances of a plan;
>
> (4) request the appointment of a trustee or examiner under section 1104 of this title, if a trustee or examiner, as the case may be, has not previously been appointed under this chapter in the case; and
>
> (5) perform such other services as are in the interest of those represented.

[459] *Id.* § 1103(a). Further, 11 U.S.C. § 1103(b) provides that "[a] person employed to represent a committee under section 1102 . . . may not, while employed by such committee, represent any other entity in connection with the case."

Once again congressional concern with the "Bankruptcy Ring" is expressed in a Code provision:

> In order to discourage the practices surrounding election of creditors' committees today and to avoid a serious potential for conflict of interest, the bill requires that the counsel to the creditors' committee cease any representation of creditors in their individual capacities in connection with the case. Under present practice, the attorney with the most proxies can usually have himself retained as counsel for a creditors' committee. The practice presents an enormous potential for conflict of interest. If the creditors on a committee split in a vote, the attorney for a particular creditor on the committee may be required to represent both the committee's position and his creditor-client's position, which may be directly contrary to the committee's position. Under this bill,

committee. Although any creditor may serve on a chapter 7 committee,[460] only creditors who are "persons" under the Bankruptcy Code may serve on a chapter 11 committee.[461] Since the term "person" excludes trusts, estates, and governmental units,[462] those entities are excluded from the chapter 11 creditors committee.[463]

D. The Meeting of Creditors

Section 341 provides that the first meeting of creditors shall be held "[w]ithin a reasonable time after the order for relief."[464] Interim rule 2003 requires that the meeting be held, in all cases, not less than twenty days and not more than forty days after the order for relief.[465] Notice must be given of the meeting[466] and the creditors' meeting in a chapter 11 case may not be held without "at least 20 days notice by mail."[467]

The debtor is required to appear at the first meeting and must submit to examination under oath.[468] Although any creditor or trustee may examine the debtor, the debtor's attorney generally asks the debtor a series of questions similar to the ones below:

> where more diverse interests may be represented on committees than under current law, the conflict is more likely to arise. Thus, the bill requires that an attorney for a creditors' committee cease representation of creditors in connection with the case. It does not require the attorney to cease representation of the creditors in matters unrelated to the case. It merely sets out a mandatory anti-conflict of interest rule for each case.

H.R. Rep., *supra* note 17, at 104-05.

[460] 11 U.S.C. § 702, 705 (Supp. III 1979).

[461] *Id.* § 1102(b)(1).

[462] *Id.* § 101(30); *see* text accompanying note 103 *supra.*

[463] *See, e.g., In re* American Atomics Corp., 2 B.R. 526, 527 (Bankr. Ct., D. Ariz. 1980) (school district not a person); *In re* Old Second Nat'l Bank, 7 B.R. 37, 39 (Bankr. Ct., N.D. Ill. 1980) (land trust not a person). *See also* H.R. Rep., *supra* note 17, at 313 (estate or trust not person).

[464] 11 U.S.C. § 341(a) (Supp. III 1979).

[465] Interim R. Bankr. P. 2003(a).

[466] 11 U.S.C. § 342 (Supp. III 1979).

[467] Interim R. Bankr. P. 2002(b).

[468] 11 U.S.C. § 343 (Supp. III 1979). Further, § 344 provides immunity from prosecution to force testimony which would otherwise be protected by the privilege against self-incrimination.

Standard Questions to be Addressed To The Debtor in a Chapter 7 Case[469]

1. Please state your name and the address at which you reside.
2. What is your age?
3. Have you been known by any other name or done business under any other name during the past six years?
4. Are you the petitioner in this bankruptcy proceeding?
5. Have you resided in the Nothern/Southern District of Mississippi for more than six months prior to filing this bankruptcy petition.?
6. Are you employed?
   a. Where?
   b. What is your job title?
   c. How frequently do you get paid?
   d. What is your "take-home pay"?
7. Have you ever filed bankruptcy before?
   a. If so, when?
8. Do you understand that if you are granted a discharge in this bankruptcy proceeding you cannot file a bankruptcy proceeding again for six (6) years? [Does not apply in chapter 13 cases.]
9. Have you read the petition in this case and all the statements and schedules attached to it?
   a. Did you sign the petition?
   b. Are the facts and statements contained in the petition and supporting documents true and correct to the best of your knowledge?
   c. Do you still desire to file bankruptcy?

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[469] This set of questions is a slightly modified version of one prepared and used by the attorneys of North Mississippi Rural Legal Services, Oxford, Mississippi.

10. Do you own any jewelry other than that listed in the documents filed with the petition?

11. Do you own any property or have any interest in any property of any kind that is not listed in your schedules?

12. Have you filed your federal and state income tax returns for the year?
    a. Have you received a tax refund this year?
    b. When did you receive that refund?
    c. Do you still have the money?

13. Do you expect to inherit any property from a deceased person or receive any property from a former spouse during the next 180 days?
    Do you understand that, should you inherit any property or receive any property from a former spouse during the next 180 days, you must report that event to the trustee or your discharge may be questioned?

14. Other than those transactions listed and described in your petition and schedules:
    a. Have you by gift or sale, transferred any property to any person within the year preceeding the filing of this petition?
    b. Has any of your property been repossessed by any creditor during the ninety days prior to the date of the filing of the petition in this case?
    c. Have you suffered a garnishment during that period?
    d. Have you made any payments to creditors during the ninety days prior to the filing of the petition herein?

15. Are you presently a party to any judicial proceeding?

16. What exemptions have you elected to use—the federal exemptions or those permitted by Mississippi law?

17. Have you or do you plan to reaffirm any debt(s)? If so, please describe the debt, name the creditor, and explain the circumstances.
18. [For chapter 11 or 13 debtors] Have you submitted (when do you propose to submit) a plan?

This list is certainly neither exhaustive nor mandatory, and questions should be added or deleted as necessary. Chapter 11 or 13 cases in which the debtor intends to continue the business would require many more questions concerning the nature of the business, the debtor's plans, or new sources of capital.

The bankruptcy judge is not permitted to preside at or even attend the first meeting.[470] This provision is designed to remove the bankruptcy judge from "situations where he will hear evidence outside of the context of a dispute that he must decide" at a later date.[471] The bankruptcy clerk normally presides at the first meeting.[472] He is responsible for recording the proceeding by "[e]lectronic sound recording equipment."[473]

Since the judge is not present at the first meeting, disputes over testimony or evidence and like matters cannot be resolved. This means that little of great consequence can occur at the first meeting. Matters that are disputed must be taken up at a later time.

V. CONCLUSION

In the first paragraph of this article, reference was made to the dramatic increase in the number of bankruptcies filed. Most of these cases are so-called "personal bankruptcies," involving individuals. The individuals who file those proceedings, as well as the creditors drawn into the case, deserve adequate representation, just as do business debtors involved in large-scale proceedings. Unfortunately, attorneys who represent these individuals before the bankruptcy court cannot always provide such representation. Frequently the attorney involved has been persuaded to appear on behalf of a client or friend who might otherwise not be able to secure representation—for bankruptcy specialists, like other professional specialists, tend to be expensive. It is hoped that this article, and others like it,[474] will do something to remedy this problem by introducing the Bankruptcy Code to the non-specialist who finds himself contemplating an appearance in bankruptcy court.

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[470] 11 U.S.C. § 341(c) (Supp. III 1979).

[471] H.R. REP., *supra* note 17, at 331.

[472] INTERIM R. BANKR. P. 2003(b)(1).

[473] *Id.* 2003(c).

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[474] Some suggested articles include: Aaron, *The Bankruptcy Reform Act of 1978: The Full Employment for Lawyers Bill* (pts. 1-3), 1979 UTAH L. REV. 1, 175, 405; (pt. 4), 1980 UTAH L. REV. 19; Ahart, *Obtaining Reaffirmation of Individual Debts Under the New Bankruptcy Code,* 97 BANKING L.J. 153 (1980); DeWoskin, *A Warning to Attorneys: Reaffirmation Under the New Bankruptcy Code*, 85 COM. L.J. 296 (1980); Hanley, *Partnership Bankruptcy Under the New Act,* 31 HASTINGS L.J. 149 (1979); Kaplan, *Chapter 13 of the Bankruptcy Reform Act of 1978: An Attractive Alternative,* 28 DEPAUL L. REV. 1045 (1979); Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure, Jurisdiction, Venue, and Procedure*, 11 ST. MARY'S L.J. 251 (1979); King, *Chapter 11 of the 1978 Bankruptcy Code*, 53 AM. BANKR. L.J. 107 (1979); Rendleman, *Liquidation Bankruptcy Under the '78 Code,* 21 WM. & MARY L. REV. 575 (1980); Silberman, *Rehabilitation and Reorganization Under the New Bankruptcy Code,* 41 ALA. LAW. 133 (1980); Weistraub & Resnick, *Involuntary Petitions Under the New Bankruptcy Code,* 97 BANKING L.J. 292 (1980); *Some Comments About the Rules of Bankruptcy Procedure Under the Bankruptcy Reform Act* (transcript), 85 COM. L.J. 125 (1980).

This list is not by any means complete nor does it include articles of a highly specialized or technical nature.

APPENDIX: LOCAL RULES OF PROCEDURE **PAGE**

(1) Local Rules of Bankruptcy Procedure, Northern District of Mississippi 718
(2) Procedures for Secured Creditors—Bankruptcy Court, Northern District of Mississippi 727
(3) Local Rules of Bankruptcy Procedure, Southern District of Mississippi 729
(4) Joint Statement by Barney L. Eaton, III, Bankruptcy Judge for the Southern District of Mississippi, and Harvey G. Henderson, United States Clerk for the Southern District of Mississippi, dated September 20, 1979 738
(5) Instructions for Properly Filing Petitions, Bankruptcy Court, Southern District of Mississippi 740

United States Bankruptcy Court
Northern District of Mississippi
P.O. Box 1800—344 May Bldg.
Greenville, Mississippi 38701

October 1, 1979

Re: Local Rules

TO ALL MEMBERS OF THE BAR:

Attached hereto are our new Local Rules. Your immediate and careful attention is directed to Local Rule Six, specifying how lists of creditors must be prepared, and to Local Rule Five dealing with the place where petitions must be filed.

The Rules of Bankruptcy Procedure in effect on September 30, 1979 will continue to apply to cases commenced under Title 11 after that date, except to the extent that they are inconsistent with any provision of the Bankruptcy Reform Act of 1978. The Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States is working on the preparation of Rules to replace the present Rules, but we are informed that final adoption of permanent new rules is some two years off.

Not all procedural matters are covered in the new Code. To fill the gap, the Advisory Committee has distributed a set of Interim Bankruptcy Rules and Forms and has suggested that the Bankruptcy Court in each district adopt them as local rules. This court has reviewed the Interim Rules and, with the approval of our two District Judges, has adopted 35 of them, without modification, as Local Rules for this district. The 8 other Interim Rules have been adopted with modifications. In addition, a few additional rules have also been adopted.

It will not be practicable for the court to furnish attorneys with copies of the "Interim Bankruptcy Rules and Forms" in the form in which they were adopted by the Advisory Committee. In order to understand our Local Rules, it will be necessary for attorneys to provide themselves with copies of the Interim Rules and Forms.

Matthew Bender has published the Interim Rules and Forms in pamphlet form and has distributed them to subscribers to Collier On Bankruptcy. For those of you who are not Collier subscribers, copies of the "Interim Bankruptcy Rules and Forms" may be obtained, at a cost of $3.00 per copy, from Commerce Clearing House, Inc., 4025 W. Peterson Ave., Chicago, IL 60646.

/s/RUTH M. WHITT, CLERK

LOCAL RULES OF BANKRUPTCY PROCEDURE

NORTHERN DISTRICT OF MISSISSIPPI

LOCAL RULE ONE

Definitions

The definitions of words and phrases in Title 11 and the rules of construction in § 102 of Title 11 govern their use in these rules, except where the context of the rule clearly indicates otherwise. In addition, the following words and phrases used in these rules have the meanings herein indicated unless they are inconsistent with the context:

(1) "Address", where an address is required by the Code, by the Rules of Bankruptcy Procedure, an Interim Rule or by these local rules shall include post office box, or rural route and box number, or house and apartment number and street or avenue; the city or town; state and zip code. A foreign address shall include corresponding data, plus the name of the foreign country.

(2) "Attorney" includes a firm of attorneys.

(3) "Bankruptcy Code" or "Code" mean [*sic*] Title 11 of the United States Code.

(4) "Bankruptcy Rule _____" refers to one of the "Rules of Bankruptcy Procedure" adopted by the Supreme Court of the United States and in effect on September 30, 1979, to the extent that such rule is not in conflict with nor inconsistent with any of the provisions of the Bankruptcy Code, or of Public Law 95-598.

(5) "Clerk" means the clerk of the United States Bankruptcy Court for the Northern District of Mississippi.

(6) The unmodified word "court" and "this court" mean the United States Bankruptcy Court for the Northern District of Mississippi.

(7) "District Court" means the United States District Court for the Northern District of Mississippi.

(8) "Firm" means a partnership or professional corporation enagaged in the practice of law.

(9) "Form(s) _____" refers to one or more of the forms appended to the Interim Rules.

(10) "Interim Rule(s) _____" refers to one or more of the Interim Bankruptcy Rules suggested by the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States as guidelines for the adoption of local rules by bankruptcy courts.

(11) "Title 11" means Title 11 of the United States Code.

(12) "Trustee" includes interim trustee and debtor in possession.

LOCAL RULE TWO

Adoption of Certain Interim Rules

Interim Rules 1002, 1003, 1004, 1005, 1006, 1007, 1008, 1009, 2002, 2005, 2006, 3001, 3002, 3003, 3004, 3005, 3006, 3007, 3008, 3009, 3010, 4003, 5001, 6001, 7001, 7002, 7003, 7004, 8001, 8002, 8003, 8004, 8005, 8006, 8007, and 13001 are hereby adopted without modification as Local Rules of this court. Each such rule may be cited as "Interim Rule ____".

LOCAL RULE THREE

Adoption of Official Forms

Forms 1 through 25 are hereby adopted, without modification, as official forms to be used in cases and proceedings pending in this court. Said forms may be adapted to conform to the circumstances of the particular case or proceeding in which they are being used.

LOCAL RULE FOUR

Adoption of Modified Interim Rule 1001

Interim Rule 1001 is modified by deleting therefrom subdivision (b) thereof. As so modified said Interim Rule is adopted as a local rule of this court and may be cited as "Modified Interim Rule 1001."

Note: This Rule adopts subdivision (a) of Interim Rule 1001 as a local rule. Subdivision (b) has been deleted because its material has been included in Local Rule One.

LOCAL RULE FIVE

Place of Filing Petition

A petition commencing a case under Title 11 shall be filed in the office of the clerk of this court; except, that where circumstances require immediate filing so as to forestall a judicial sale or foreclosure sale of any of debtor's property, or other like emergency, the petition may be carried by hand to the office of the clerk of the district court at Aberdeen, Clarksdale or Oxford, Mississippi and there tendered for filing; and the clerk of the district court and his deputies are hereby appointed deputy clerks of this court for the purpose of filing such petitions. The clerk of the district court shall immediately notify the clerk of this court of such filing by telephone, and shall obtain from the clerk of this court a file number for the case so filed, and shall forthwith transmit the petition so filed, with any accompanying papers, to the clerk of this court.

LOCAL RULE SIX

List of Creditors; Matrix

When filing a voluntary petition with the clerk of the United States Bankruptcy Court, four complete sets of debtor's petition, schedules or Chapter 13

Statement and Statement of Affairs must be filed. THE DEBTOR'S ATTORNEY must also prepare and present ONE MASTER ADDRESS LIST, using forms which may be obtained from the Bankruptcy Clerk.

IT IS IMPORTANT THAT ONLY THE PRESCRIBED FORM BE USED, and that the instructions for its use be carefully followed. The overall size of the form and address blocks thereon are especially designed for equipment used by the Bankruptcy Court. This system will provide improved service to debtors and will expedite the mailing of notices to creditors. THE NAME AND COMPLETE MAILING ADDRESS, INCLUDING ZIP CODE, must be furnished for all creditors and be listed in the same order as they are listed in Schedules A-1, A-2 and A-3, and should include the name and address of cosigners of any debt. Use the first two boxes for names and addresses of the debtor and the debtor's attorney. DO NOT TYPE ON THE MASTER ADDRESS FORM, but use it as a guide behind a sheet of bond paper the same size. Be sure the ENTIRE ADDRESS IS WITHIN THE ADDRESS BLOCK. ONLY ONE NAME AND ADDRESS PER BLOCK.

Local Rule Seven

Interim Trustee in Involuntary Liquidation Cases

Interim Rule 2001 is modified in the following respects:

(1) Subdivision (a) is deleted.

(2) Subdivision (c) is modified so as to read as follows:

> "*Bond of Applicant.* As a condition to granting an application of the kind mentioned in subdivision (b) of this rule the court may require the applicant to furnish a bond in an amount and with such surety as the court shall specify, conditioned to indemnify the debtor for the costs, attorney's fee, expenses and damages allowable under § 303(i) of the Code. On application of the debtor and on notice to party or parties who procured the appointment of the interim trustee, the court may increase the amount of the bond."

(3) Subdivision (d) is modified so as to read as follows:

> "*Order of Appointment.* An order appointing an interim trustee under this rule shall state why the appointment is necessary. A certified copy of the order shall forthwith be delivered to the debtor by the applicant, or mailed to him at his last known address, and a copy shall also be delivered to such other persons, if any, as the court may designate."

(4) Subdivision (e) is modified so as to read as follows:

> "*Turnover and Report.* After qualification of a trustee elected under § 702 of the Code, or on approval by the court of a bond filed by the debtor pursuant to the second sentence of § 303(g) of the Code, the

> interim trustee shall, unless the court orders otherwise, forthwith turn over to such elected trustee or to the debtor, as the case may be, all the records and property of the estate in his actual possession or subject to his control as interim trustee and shall within 30 days thereafter file his final report and account. The debtor or trustee shall permit the interim trustee to have such access to the records turned over by him as may be necessary for the proper preparation of such final report and account."

As so modified, said Interim Rule is adopted as a local rule of this court and may be cited as "Modified Interim Rule 2001."

Local Rule Eight

Meeting of Creditors or Equity Security Holders

Interim Rule 2003 is modified in the following respects:

(1) The first sentence of subdivision (a) is modified so as to read as follows:

> "The court shall call a meeting of creditors to be held not less than 20 nor more than 50 days after the order for relief; except that in a Chapter 7 case the meeting may be held earlier, but not less than 10 days after the order for relief."

(2) Subparagraph (1) of subdivision (b) is modified so as to read as follows:

> "(1) *Meeting of creditors.* The clerk, or a deputy clerk, shall preside at the meeting of creditors. The business of the meeting shall include the examination of the debtor and, in a Chapter 7 case, if the election of a trustee or of a creditors' committee is requested by creditors entitled by subsection (b) of § 702 of Title 11 to request such an election, it shall include the election of a trustee or of a creditors' committee. When a trustee is elected the creditors may recommend the amount of the trustee's bond to be fixed by the court."

(3) The second sentence of subparagraph (3) of subdivision (b) is modified so as to read as follows:

> "Notwithstanding objection to the amount of allowability of a claim for the purpose of voting, the presiding clerk or deputy clerk shall tally said vote in the amount claimed by the claimant and shall report the result of the election that would obtain with both the lower and higher of the disputed amounts."

(4) Subdivision (c) of said Rule is modified so as to add the following sentence:

> "However, the court may in any case, in its discretion, direct that a meeting of creditors or equity security holders be recorded by a court

reporter."

(5) The second sentence of subdivision (d) of said Rule is modified by inserting, after the word "disputed," the following words: "or if there is a dispute as to whether or not creditors in the required number and amount had requested the election of a trustee."

(6) By adding to such Rule an additional subdivision, to be designated as subdivision (e) which shall read as follows:

> "(e) *Dispute Other Than Election; Report to Court.* If a dispute other than one concerning an election arises at a meeting of creditors or equity security holders and if the dispute is one which only the court can resolve, the presiding clerk or deputy clerk, if requested during the meeting so to do by the debtor, the trustee, a creditor or other interested party, shall, promptly after the meeting, inform the court in writing of the dispute."

(7) By adding to such Rule an additional subdivision, to be designated as subdivision (f), which shall read as follows:

> "(f) *Action by Presiding Clerk.* The clerk or deputy clerk presiding shall have power (1) to declare a meeting terminated; (2) to regulate the order in which the trustee and creditors may examine the debtor; (3) to limit the length of the examination by any person; (4) to continue or adjourn a meeting to a specified time; (5) to take a recess; (6) to ask the debtor one or more questions for purposes of clarification. Any conduct which has the effect of interfering with the orderly conduct of the meeting by the clerk or deputy clerk presiding thereat, may be punished as a contempt of court."

As so modified, Interim Rule 2003 is adopted as a local rule of this Court and may be cited as Modified Interim Rule 2003.

LOCAL RULE NINE

Notice to Trustee of Selection

Interim Rule 2004 is modified by adding at the end thereof the following:

> "An interim trustee appointed pursuant to § 701(a) or § 303(g) of the Bankruptcy Code shall, with his bond or other notification of acceptance, file in the clerk's office a certificate, signed by him, stating that he is a disinterested person as defined in § 101 of the Bankruptcy Code. Such an interim trustee who, on notification of his appointment, knows that he is not a disinterested person, shall immediately notify the clerk of that fact by telephone."

As so modified said Interim Rule is adopted as a local rule of this Court and may be cited as Modified Interim Rule 2004.

LOCAL RULE TEN

Relief from Automatic Stay

Subdivision (a) of Interim Rule 4001 is modified so as to read as follows:

"(a) *Final Hearing.* The stay of any act against property of the estate under § 362(a) of the Bankruptcy Code expires 60 days after a final hearing is commenced pursuant to § 362(e)(2) of the Code unless within that time at or after the final hearing the court determines that the stay be continued."

As so modified, Interim Rule 4001 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 4001.

LOCAL RULE ELEVEN

Grant or Denial of Discharge

Interim Rule 4002 is modified so as to read as follows:

"Bankruptcy Rule 404 applies in cases filed under chapter 7, Liquidation, of the Bankruptcy Code except that (1) the references to § 14(c) of the Act shall be read as references to § 727(a) of the Code and (2) notwithstanding subdivision (d) of Rule 404 the court shall defer the entry of an order granting a discharge for 45 days and, on application within the 45 day period, the court may for cause further defer entry of the order to a date certain."

As so modified, Interim Rule 4002 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 4002.

LOCAL RULE TWELVE

Reaffirmation: Discharge Hearing

(a) Application by a debtor for approval of a reaffirmation agreement shall be filed not later than 15 days after the execution of such agreement, and in no event later than 60 days after the expiration of the date fixed as the last day for the filing of objections to the debtor's discharge, unless the time be extended for cause shown. Such application shall specify the nature of the debt which the debtor wishes to re-affirm and shall have annexed to it as an exhibit the agreement of reaffirmation.

(b) Within no more than 45 days after the entry of an order granting or denying a discharge, and on at least 10 days notice to the debtor, the trustee and to a creditor whose debt is the subject of a reaffirmation application, the court shall hold a hearing as provided in § 524(d) of the Bankruptcy Code.

LOCAL RULE THIRTEEN

Jury Trial

Interim Rule 9001 is modified as follows:
(1) Subdivision (c) of said Interim Rule is modified so as to read:

"(c) *Filing; Waiver.* A demand for a jury trial shall be filed in the office of the clerk within five days after it has been served. The failure of a party to serve and/or file a demand as required by this rule constitutes a waiver by him of trial by jury."

(2) Subdivision (d) of said Interim Rule is modified so as to read:

"(d) *Applicability of Certain of the Federal Rules of Civil Procedure; Size of Juries.* Rule 47 and Rules 49, 50 and 51 of the Federal Rules of Civil Procedure apply when a jury trial is conducted. The jury shall consist of six members in all jury cases, with three peremptory challenges to each opposing party. In its discretion, the court may impanel not more than two alternate jurors, with one peremptory challenge allowed to each of the opposing parties."

As so modified, Interim Rule 9001 is adopted as a Local Rule of this court and may be cited as Modified Interim Rule 9001.

LOCAL RULE FOURTEEN

Limit on Interrogatories

Interrogatories propounded by any party to the adversary party or parties shall be limited to two sets of questions, as follows:

(a) The first set of questions shall not exceed 30 in number, and any subpart of a question shall be counted as a question;
(b) The second set of questions shall not exceed 20 in number, and each subpart shall constitute a question.
(c) No third set of interrogatories, nor interrogatories in addition to those hereinabove fixed shall be allowed, except by order of the court for good cause shown.

LOCAL RULE FIFTEEN

Answers to Interrogatories

When answering interrogatories and requests for admission, the replying party shall, as part of his answer, set forth immediately preceding the answer the question or request to which such answer is given. Failure to comply with this rule shall result in the clerk's refusal to file same.

LOCAL RULE SIXTEEN

Briefs and Memoranda of Law

Whenever a trial brief or memorandum of law is required or permitted by the court, such brief or memorandum shall not exceed 25 pages without prior approval of the court. Each brief or memorandum filed shall be accompanied by the certificate of the attorney filing it to the effect that a copy of the brief or memorandum has been served upon the attorney for the opposing party or parties.

LOCAL RULE SEVENTEEN

Membership in the Bar of this Court; Discipline of Attorneys

(a) The Bar of this court shall consist of attorneys who have been admitted to practice before the District Court or who may hereafter be so admitted, and who remain members in good standing of the Bar of that court.

(b) The first attorney to appear for a party in any case or proceeding commenced or pending in this court shall be the attorney of record for that party in said case or proceeding. Appearance may be by a firm if one or more members of the firm are members of the Bar of this court.

(c) There shall be only one attorney of record for a party.

(d) All pleadings, motions, orders or other papers required or permitted to be served on the attorney for a party shall be served on the attorney of record for that party.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF MISSISSIPPI

IN THE MATTER OF ESTABLISHING
LOCAL RULES OF THIS COURT

ORDER ESTABLISHING LOCAL RULES

The undersigned Bankruptcy Judge for the Northern District of Mississippi does hereby adopt the foregoing Local Rules, effective October 1, 1979. These Local Rules shall apply to all cases commenced under Title 11 of the United States Code after September 30, 1979 and to all civil proceedings arising under said Title, or arising in or related to cases under said Title.

The Clerk will cause this order and the Local Rules attached hereto to be spread upon the records of this Court and shall forward certified copies to the Clerk of the District Court, to the Supreme Court, to the Chief of the Bankruptcy Division of the Administrative Office of the United States Courts; and to the Advisory Committee on Bankruptcy Rules of the Judicial Conference of the United States.

This order and the rules hereto attached shall be distributed by the Clerk to the Members of the Bar.

ORDERED AND ADOPTED, this the 1st day of October, 1979.

/s/Eugene J. Raphael
United States Bankruptcy Judge

The foregoing order and the Local Bankruptcy Rules attached thereto are hereby approved and adopted this 1st day of October, 1979.

/s/William C. Keady
United States District Judge

/s/Orma R. Smith
United States District Judge

PROCEDURES FOR SECURED CREDITORS

1. *Abandonment.* Probably the simplest and easiest way a secured creditor, whose collateral is worth less than the indebtedness secured, can free the collateral from the control of this court is to file an application, under Sections 554(b) and 102(1) of the Bankruptcy Code, requesting the court to order the trustee to abandon the property. Such an application must be accompanied by a note to the effect that unless an objection and a request for a hearing is served on the creditor's attorney and filed with the court not more than fifteen days from the date of [*sic*] the application is filed, the court will act on the application without a hearing. The notice and application when filed must be accompanied by a certificate under penalty of perjury (28 U.S. Code, Sect. 1746), showing service of the notice and of the application (including Exhibits) upon the debtor, his attorney, the trustee or interim trustee and/or the debtor in possession and by a filing fee of $15.00. Checks and money orders should be made payable to Clerk, U.S. Bankruptcy Court. *The original and 4 copies of a proposed order, a stamped, self-addressed envelope and a stamped envelope addressed to yourself, the trustee, the debtor and his attorney should be enclosed.*

The application must:

(1) Have attached to it as Exhibits completely legible photo copies of the entire security agreement and of any title certificate issued or U.C.C. Financing statement(s) filed in connection with same;
(2) State the nature of the debt and the amount owing for balance of principal, interest, late charges and attorney's fee;
(3) State when the security interest attached and when and in what manner it was perfected;
(4) State whether and when any default has occurred;
(5) Describe the property for which abandonment is sought and
(6) State the market value of said property.

2. *Complaint.* A creditor may, in the alternative, proceed by filing a complaint under Sect. 362(d) of the Bankruptcy Code for relief from the automatic stay. Such a complaint shall name as defendants the debtor(s) as well as the trustee or interim trustee and/or the debtor in possession and shall allege the same matters and have annexed to it the same Exhibits as are required for the application for abandonment described in paragraph 1, above. There is a filing fee of $15.00 on filing the complaint (check payable to Clerk, U.S. Bankruptcy Court).

3. *Exemption.* The trustee is no longer required to file an exemption report. Unless the trustee or another interested party objects within 15 days after the meeting of creditors to an exemption claimed by an individual debtor in his schedules, and if the time to object is not extended by the Court, all exemptions claimed by the debtor in his schedules are automatically allowed. If after such time has elapsed the property covered by a security agreement thus become [*sic*] exempt property, it is then out of the estate and the creditor is then

free to take such steps as he may choose to enforce his rights to that property, subject, however to such rights as the debtor may have to avoid a lien on the collateral under Section 522(f) or to redeem the collateral under Section 722 of the Bankruptcy Code.

EUGENE J. RAPHAEL, Bankruptcy Judge

LOCAL RULES OF BANKRUPTCY PROCEDURE

SOUTHERN DISTRICT OF MISSISSIPPI

LOCAL RULE No. 1

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Duties of Attorney For Debtor in Chapter 7 Cases

Each attorney filing a Chapter 7 (liquidation) bankruptcy petition with this court shall promptly perform the following acts and procedure:

1. Prior to filing the petition, the attorney shall personally review the petition to determine and insure that

A. The correct form has been used;

B. The petition has been completed and is accurate;

C. All state and federal exemptions available have been properly claimed with the correct statutory citations;

D. All of the debtor's assets and property has been accurately identified;

E. All lien creditors, their security interests and the collateral are accurately described;

F. The debtor has signed the petition at all appropriate places; and

G. The attorney's statement of compensation from the debtor is included in or filed with the petition.

2. After filing the petition, the attorney must determine the name of the person appointed by the court to serve as the trustee for the debtor. The attorney shall fully cooperate with the trustee in the performance of the trustee's duties and shall keep the trustee advised of all matters pertinent to the debtor and the administration of the estate.

3. If the debtor operates a business, the attorney shall obtain all business records, ledgers, journals and cancelled checks of the debtor, all keys to the debtor's business, insurance policies, leases and contracts of the debtor. Such items should be delivered to the trustee within three days after the trustee's appointment.

4. The attorney shall determine whether the debtor wishes to retain any assets subject to a security interest or lien, and shall contact the creditors to determine the fair value of the collateral and whether the creditor desires a lump-sum payment or will refinance for the debtor. The attorney shall determine whether such collateral is exempt property; whether there is any equity in the property for the debtor's estate, and whether the property is redeemable under 11 U.S.C. § 722.

5. In determining the value of automobiles and trucks, the court shall use as a rule of thumb the "average trade-in" value stated in the most recent issue of the "NADA Official Used Car Guide," Southeastern Edition, as the fair value of the vehicle for redemption purposes.

6. When the debtor wishes to redeem personal property, the attorney shall, within two weeks after the filing of the petition, attempt to reach an agreement on behalf of the debtor with the creditor holding the security inter-

est either (1) for the debtor to pay the present fair value of the collateral in a lump sum; or (2) the creditor to refinance the present fair value of the collateral. If no agreement can be reached with such creditor, the attorney shall direct the debtor to surrender possession of the collateral to the trustee.

7. The attorney shall take special care to claim as exempt any equity in an automobile of the debtor in accordance with 11 U.S.C. § 522(d)(2).

8. In a no-asset case, if it is determined that the automobile encumbered by a security interest that the debtor is using has no collision insurance, the attorney shall immediately contact the creditor holding the security interest who must then obtain such insurance.

9. Creditors holding security must send copies of their security agreements to the trustee. The attorney for the debtor is under a duty to communicate this fact to the creditor as soon as possible.

10. The attorney shall use diligent effort to prevent the debtor from agreeing to a redemption of property for more than its present fair value and from reaffirming any indebtedness which is not in the best interest of the debtor. Your duty to the debtor includes protecting the debtor from creditors' improper actions as well as imprudent acts of his own.

11. The attorney shall appear at the first meeting prepared to inform the trustee of any agreements to redeem personal property between the creditors and the debtor. The attorney should at that time have prepared all petitions and orders necessary to finalize redemption or reaffirmation.

12. The attorney shall appear at the final discharge hearing with his client, prepared to answer any questions from the Court concerning the debtor's estate, especially questions concerning petitions for reaffirmation. Petitions for reaffirmation will be approved or denied at this hearing.

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 2

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Reassumption Agreements Concerning Vehicles in Chapter 7 Cases

Any creditor and debtor wishing to enter into a reassumption agreement concerning a vehicle must follow the procedures set out below:

1. At the meeting of creditors, the creditor must submit in writing an application for Court approval of any agreement to reassume debts on vehicles, said application setting forth the terms and conditions of the agreement and a space for the signature of the debtor, the creditor and the trustee.

(a) This procedure shall amount to tentative approval of the reassumption agreement, subject to final approval by the Court at the discharge hearing.

2. Should the attorney for the trustee become involved in the preparation and/or presentation of pleadings and orders relating to the reassumption agreement and its final approval, a reasonable administrative fee not to exceed $100 shall be assessed to the creditors to cover the trustee's attorney's fees. [vacated by Local Rule No. 9]

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

Local Rule No. 3

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Any creditor holding a security interest in property of the debtor's estate may request that the trustee abandon such property pursuant to 11 U.S.C. § 554. Any creditor seeking an abandonment of property must follow procedures set out below:

1. The creditor should petition for abandonment of property. This petition should contain:

(a) the name of the creditor;
(b) identification of the property sought to be abandoned;
(c) a statement of the grounds for the petition; and
(d) a space for the debtor, creditor and trustee's signature of approval.

2. Consensual agreement among the above interested parties will constitute a waiver of any statutory notice and hearing otherwise required under § 554(b).

3. An order abandoning the property should also be prepared and presented by an attorney for the Bankruptcy Judge's signature.

4. All pleadings and orders pertaining to the abandonment of property shall be prepared and submitted for execution by the Court at the meeting of creditors.

5. If the creditor does not prepare these pleadings and orders, the attorney for the trustee shall prepare the forms for the creditor, and a reasonable administrative attorney's fee not to exceed $100 will be assessed to the creditor to cover the trustee's attorney's fees. Any request for fees in an amount greater than $100 shall require separate approval from the Court. [vacated by Local Rule No. 9]

6. After the order for abandonment of property has been entered, the creditor will contact the debtor's attorney to set a time for the creditor to take possession of the abandoned property.

DATED at Jackson, Mississippi, this the 15th day of April, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 4

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi hereby adopts and promulgates the following rule:

Any Debtor holding personal property for personal, family or household use that is subject to a judicial lien or a nonpossessory nonpurchase money security interest, may request to avoid said lien to the extent that it impairs any exemption of that property, pursuant to 11 U.S.C. § 522(f). The Debtor may request an avoidance of a transfer of personal property, otherwise exempt, upon inaction of the trustee to seek the avoidance.

Any Debtor seeking to avoid a lien or transfer of property must follow the procedure set out below:

On Schedule B-4—Property Claimed as Exempt type:

> *"ANY LIEN WHICH MAY BE AVOIDED PURSUANT TO 11 U.S.C. 522(f) SHALL BE AVOIDED FOR THE BENEFIT OF THE DEBTOR(S)."*

DATED at Jackson, Mississippi, this the 1st day of February, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 5

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Attorneys' Fees for Chapter 7 and Chapter 13 Cases

Each attorney filing a Chapter 7 (Liquidation) or Chapter 13 (Wage Earner) bankruptcy petition with this Court shall submit therewith requisite Disclosure Statements (Attorney's statement of compensation).

At the first meeting of creditors, the Interim Trustee or Trustee will consider the attorney's statement of compensation in order to insure that:

A) All of the duties of the attorney have been performed pursuant to Local Rule No. 1;
B) All of the duties expected of a competent attorney have been performed;

C) Said compensation is commensurate with the quality of work demanded by this Court.

If the presiding Trustee believes that any or all of the foregoing have not been met, he may, accordingly, enter his objection to the allowance of all or any part of the attorney's compensation.

The Court shall consider the Trustee's objection and rule accordingly.

DATED at Jackson, Mississippi, this the 18th day of June, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 6

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

1. The responsibility for checking the Master Address List of Creditors against the Bankruptcy Schedules of the Debtor shall be that of the Attorney for the Debtor or the Debtor filing pro se, and not the responsibility of the Clerk or Deputy Clerks of the Bankruptcy Court. Therefore, it is incumbent upon the Debtor or his Attorney to positively list every creditor listed on the schedules, the Attorney for the Debtor, and the petitioning Debtor as well, upon the Master Address List with their corresponding current and proper mailing addresses.

2. The Bankruptcy Clerk's Office will not furnish copies or material on file to any requesting party until check or money order in the proper amount has been received in advance. Copy fee is Fifty Cents ($.50) per page and record search is Two Dollars ($2.00) per search. Checks or money orders must be made payable to:

Clerk, U.S. Bankruptcy Court
P.O. Drawer 2448
Jackson, Mississippi 39205

IF CASH IS SENT, IT MUST BE AT THE SENDER'S RISK.

3. Any party requesting a copy of the § 341 meeting (first meeting of creditors) may obtain said copy of the recorded proceedings by:

(1) Making a copy of the recording in the Office of the Clerk of the Bankruptcy Court by furnishing their own recording machine and tape, or

(2) By hiring a licensed Court Reporter to come to the Office of the Clerk of the Bankruptcy Court to transcribe said tape.

Upon verified transcription of said recording by either of the above methods, certification by the Clerk of the Bankruptcy Court must be made before same can be given evidentiary effect.

DATED AT Jackson, Mississippi, this the 18th day of June, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 7

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Filing Fees in Chapter 13 Petitions

Any debtor filing a petition, pursuant to 11 U.S.C. §§ 1301-1331 and Chapter 13 of the Bankruptcy Code of 1978, must make one of the following elections regarding the payment of filing fees as required under 28 U.S.C. § 1930(a)(1):

1. Submit with the Chapter 13 Petition Sixty and No/100 Dollars ($60.00) in the form of cash, money order or check of the debtor's attorney; or
2. If payment of the Sixty and No/100 Dollars ($60.00) filing fee does not accompany the Chapter 13 Petition, said filing fee will automatically be paid and provided for under debtor's Plan for Adjustments of Debts.

DATED at Jackson, Mississippi, this the 15th day of August, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE No. 8*

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Any creditor or interested party desirous of a filed copy of a Chapter 13 Petitioner's Plan for Adjustment of Debts filed with this Court from the Jackson or Western Division of the Southern District and pursuant to Interim Bankruptcy Rule 1002 shall make his/her request and obtain said copy from the attorney of record for the petitioner.

DATED at Jackson, Mississippi, this the 19th day of August, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

* Vacated November 10, 1980. Replaced by Local Rule No. 13.

LOCAL RULE NO. 9

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Paragraph number 2 of Local Rule No. 2 dated February 1, 1980, and Paragraph number 5 of Local Rule No. 3 dated April 15, 1980, are hereby vacated and the following adopted:

(a) Pursuant to § 330(a)(2) which entitles a Trustee to "reimbursement for actual necessary expenses" any Trustee on the Panel is authorized to assess the debtor, creditor or any interested party for actual necessary expenses incidental to the Trustee's duties at the instance of or for the benefit of said debtor, creditor or interested party, not to exceed a charge of $25.00 per debtor, creditor or interested party in each consumer bankruptcy. This local rule is obviated by the fact that the Trustees serving on the Trustee Panel created under the Bankruptcy Reform Act of 1978, are incurring secretarial, clerical, general office and insurance expenses not contemplated for nor provided in the statutory fee provision of § 330(b).

(b) A Trustee may increase his requests for reimbursement for reasonable necessary expenses, upon Court approval, in non-consumer bankruptcies.

Dated at Jackson, Mississippi, this the 19th day of September, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 10

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

After hearings held in the Bankruptcy Court, the prevailing party shall submit an order, consistent with the Court's ruling, within five (5) days of the hearing for the Court's approval and entry.

DATED at Jackson, Mississippi, this the 15th day of October, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 11

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Final Meeting

The Court shall order a final meeting of creditors in every case in which the net proceeds realized exceed $500 and shall mail a summary of the trustee's final account to the creditors with the notice of the meeting. The trustee shall attend the final meeting and shall, if requested, report on the administration of the estate.

DATED at Jackson, Mississippi, this the 3rd day of November, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 12

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

In accordance with 11 U.S.C. § 363(b) a trustee is required to give notice of any proposed use, sale, or lease of property of the estate, other than in the ordinary course of business. Accordingly, the trustee shall be required to do all noticing, mailing, and shall be responsible for sending a certificate of mailing of the notice to the Bankruptcy Court Clerk's Office.

DATED at Jackson, Mississippi, this the 5th day of November, 1980.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

LOCAL RULE NO. 13

Pursuant to 11 U.S.C. § 105(a), the Bankruptcy Court for the Southern District of Mississippi, hereby adopts and promulgates the following rule:

Local Rule No. 8 dated August 19, 1980, is hereby vacated and the following adopted:

1. In accordance with Bankruptcy Rule 13-201, the debtor shall furnish to the Court a sufficient number of copies of the summarized Chapter 13 plan to enable the Court to mail a copy to each creditor. These copies shall be furnished with the filing of the original petition or within 10 days thereafter.
2. The attorney for the debtor shall prepare and present a Master Address List on forms provided by the Office of the Clerk of the Bankruptcy

Court. The Master Address List shall include the correct mailing addresses of the debtor, the attorney for the debtor, and all creditors listed on the bankruptcy petition schedules. The responsibility for checking the accuracy of the Master Address List shall be that of the attorney for the debtor or the debtor filing pro se, and not the responsibility of the Bankruptcy Court.

3. In the event the debtor seeks modification of the Chapter 13 plan after confirmation, pursuant to 11 U.S.C. § 1329, the attorney for the debtor shall send notice of such modification, accompanied by a copy or a summary of the proposed modification and giving a date within which to object, to all creditors and parties in interest. Copy of the notice, including a Certificate of Mailing, shall be filed with the Court. Prior to filing the proposed modification, the attorney for the debtor shall contact the Court for a hearing date. If no objection to modification is timely filed, the Court may, without a hearing, approve the plan as modified.

DATED at Jackson, Mississippi, this the 19th day of January, 1981.

Barney E. Eaton, III
Bankruptcy Judge
Post Office Drawer 2448
Jackson, Mississippi 39205

Effective October 1

BANKRUPTCY CHANGES ANNOUNCED

Joint Announcement by
Barney E. Eaton, III
Bankruptcy Judge for the
Southern District of Mississippi

and

Harvey G. Henderson, Clerk
U.S. District Court for the
Southern District of Mississippi

TO ALL MEMBERS OF THE BAR:

Your attention is called to the "Bankruptcy Reform Act of 1978," which, for all practical purposes, will go into effect on October 1, 1979, and will govern all cases commenced under Title 11, United States Code, after September 30, 1979.

One of the changes made by this act is the place of filing petitions commencing a case under the new Title 11. On and after October 1, 1979, petitions will NO LONGER be filed in the office of the Clerk of the United States District Court, but ARE to be filed in the office of the Clerk of the United States Bankruptcy Court, Jackson, Mississippi.

The Clerk of the United States Bankruptcy Court for the Southern District of Mississippi, will be Mrs. Mollie C. Jones. Her office will be physically located at 1619 Deposit Guaranty Building, 200 East Capitol Street, Jackson, Mississippi. The mailing address will be Post Office Drawer 2448, Jackson, Mississippi 39205, and the telephone number will be 601/353-5221.

Filing fees are prescribed by § 1930 of Title 28, U.S. Code. The filing fee must be paid at the same time that the petition is presented for filing, except that an individual who is filing a voluntary case or a joint case may pay the fee in installments if he files with the petition an application which complies with Bankruptcy Rule 107. The filing fee in Liquidation Cases (straight bankruptcy) and in Chapter 13 cases will be $60.00. All checks for filing fees are to be made payable to the order of Clerk, U.S. Bankruptcy Court.

For convenience of debtors and their attorneys, in cases where immediate filing is essential for the purpose of preventing a foreclosure or execution sale of debtor's property, or to stop the garnishment of a debtor's wages, or other similar emergency situation, the Clerk of the District Court and his deputies have been made deputy clerks of the Bankruptcy Court for the purpose of filing petition [*sic*] under Title 11 which are *HAND-CARRIED* to any office of the Clerk of the United States District Court. Such petitions will be deemed to have been filed in the Bankruptcy Court as of the date they are delivered to the office of the Clerk of the District Court. However, where filing is made by mail, the ONLY place to file will be in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi. All papers subsequent to the originating petition are to be filed ONLY in the office of the Clerk of the Bankruptcy

Court at Jackson, Mississippi.

Attorneys practicing in the Bankruptcy Court will be expected to familiarize themselves, prior to October 1, 1979, with the changes made in Titles 11 and 28, U.S. Code, by the Bankruptcy Reform Act of 1979.

To summarize:

1. Bankruptcy petitions and Chapter Case petitions filed before October 1, 1979, will continue to be filed in the office of the Clerk of the United States District Court, and such cases will be governed from start to finish by the provisions of the present Bankruptcy Act and Rules.
2. All cases commenced under the Bankruptcy Code (Title 11, U.S. Code) after September 30, 1979, will be filed only in the office of the Clerk of the Bankruptcy Court, Jackson, Mississippi, except for EMERGENCY filings as outlined above.
3. New Rules of Bankruptcy Procedure are under consideration and the local Bankruptcy Court will adopt new Rules very soon and make an announcement concerning the new Rules and how copies may be obtained.

This the 20th day of September, 1979.

/s/Barney E. Eaton, III
Bankruptcy Judge

/s/Harvey G. Henderson
Clerk

IN THE UNITED STATES BANKRUPTCY COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

Instructions for Properly Filing Petitions Under the Bankruptcy Code

1. A petition incorrectly filed under the new Code will not be processed *or* a meeting of creditors scheduled until an amendment is correctly filed. Failure to promptly amend may result in the debtor's attorney being ordered to refund his fee to the debtor or if debtor's attorney has not been paid, compensation may be ordered denied.

2. On and after October 1, 1979, petitions are NO LONGER filed in the office of the Clerk of the United States District Court, but ARE filed in the office of the Clerk of the United States Bankruptcy Court, Jackson, Mississippi.

3. The Clerk of the United States Bankruptcy Court for the Southern District of Mississippi, is Mrs. Mollie C. Jones. Her office is located at 1619 Deposit Guaranty Building, 200 East Capitol Street, Jackson, Mississippi. The mailing address is Post Office Drawer 2448, Jackson, Mississippi 39205, and the telephone number is 601/353-5221.

4. Filing fees are prescribed by § 1930 of Title 28, U.S. Code. The filing fee must be paid at the same time the petition is presented for filing, except that an individual who is filing a voluntary case or a joint case may pay the fee in installments if he files with the petition an application which complies with Bankruptcy Rule 107. The minimum amount of an installment payment on a filing fee is $15.00. The period of time within which the payment of filing fees can be paid in installments is four months. The application for payment of filing fees in installments should be prepared accordingly. The filing fee in Liquidation Cases (straight bankruptcy) and in Chapter 13 cases is $60.00. All checks and money orders for filing fees are to be made payable to the order of Clerk, U.S. Bankruptcy Court. *A personal check on the debtor will not be accepted.* If cash is submitted for any fee, the *EXACT AMOUNT* must be presented inasmuch as the Bankruptcy Clerk's office will not have adequate means of making change.

5. For convenience of debtors and their attorneys, in cases where immediate filing is essential for the purpose of preventing a foreclosure or execution sale of debtor's property, or to stop the garnishment of a debtor's wages, or other similar emergency situation, the Clerk of the District Court and his deputies have been made deputy clerks of the Bankruptcy Court for the purpose of filing petition [*sic*] under Title 11 which are *HAND-CARRIED* to an office of the Clerk of the United States District Court in Hattiesburg, Meridian, and Biloxi. Such petitions will be deemed to have been filed in the Bankruptcy Court as of the date they are delivered to the office of the Clerk of the District Court in these three divisions only. However, where filing is made by mail, the ONLY place to file will be in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi. All papers subsequent to the originating petition are to be filed ONLY in the office of the Clerk of the Bankruptcy Court at Jackson, Mississippi.

6. The attorney for the debtor must show his telephone number on the petition. If debtor is not represented by an attorney, debtor's telephone number must be shown on the petition.

7. All petitions shall include the Zip Code Number, as prescribed by the United States Post Office Department, for the debtor, his attorney and all persons listed in a debtor's schedules.

8. All petitions shall state the full name of an individual debtor—not merely initials. The blank following each item of the schedules must be filled in to show the facts. If the answer if [*sic*] "none", it shall be so stated.

9. Debtors, until their proceedings are closed, shall promptly notify the Bankruptcy Clerk's office *in writing* with respect to each and every change of address including new Zip Code.

10. A petition must be signed by the debtor and the attorney and must be notarized.

11. A petition must have a Social Security number for individuals and a Tax Identification number for corporations.

12. Under Rule 108, the United States Bankruptcy Clerk may accept the debtor's petition with a list of all the debtor's creditors with their addresses and Zip Codes; and, the schedules and Statement of Affairs must be filed within 10 days thereafter.

13. The attorney's Disclosure of Fees under Rule 219(b) *MUST* be filed at the time the original petition and schedules are filed with the United States Bankruptcy Clerk.

14. When filing a petition with the United States Bankruptcy Clerk, the following number of copies of the petition, statement of affairs, and schedules are required: Chapter 7—original and 2 copies; Chapter 9—original and 5 copies; Chapter 11—original and 5 copies; Chapter 13—original and 2 copies. The debtor's attorney *MUST ALSO PREPARE AND PRESENT* one Master Address List on *forms provided by the Bankruptcy Clerk.*

IT IS IMPORTANT THAT ONLY THE PRESCRIBED FORM BE USED, and that the instructions for it's [*sic*] use be carefully followed. The overall size of the form and address blocks thereon are especially designed for equipment now used by the Bankruptcy Clerk's office. Use of the separate address sheet will enable the Bankruptcy Clerk's office to reproduce address labels by a photocopy process. This system will provide improved service to petitioners and will significantly expediate the mailing of notices to creditors. The name and address, including Zip Code, *MUST BE FURNISHED FOR ALL CREDITORS* listed in Schedules A-1, A-2, and A-3 and co-signers of any debt. *Use the first two boxes for* names and addresses of the attorney and debtor. *DO NOT TYPE ON THE MASTER ADDRESS FORM,* but use it as a guide behind a sheet of bond paper the same size. Be sure the entire address is within the address block. *ONLY ONE NAME AND ADDRESS PER BLOCK EXCEPT FOR THE DEBTOR WHICH IF IT IS A HUSBAND AND WIFE MAY BE IN ONE BLOCK IF THEY HAVE THE SAME ADDRESS.*

15. Any correspondence requiring an answer from the Bankruptcy Clerk should be accompanied by a stamped, self-addressed envelope.

INSTRUCTIONS FOR FILING A CHAPTER 13

1. The plan must be filed by the debtor either with the filing of the original petition or within 10 days thereafter.
2. When the plan is filed, there should be included a sufficient number of plans to be distributed to each creditor along with five copies for the court file.
3. The debtor must file a supplement to the Chapter 13 Statement of the exemption law which would be selected, and the property which would be claimed as exempt, if the debtor's estate were liquidated under Chapter 7.

HYPNOSIS AND THE LAW OF EVIDENCE: TESTIMONY FROM THE HYPNOTICALLY-REFRESHED MEMORY

*Chester L. Quarles**

I. Introduction

"Hypnosis" is a provocative term. It brings to mind primitive religions, witchcraft, faith healing, and stage magicians. The extensive use of hypnosis, in fact, belies these negative connotations. The medical profession has recognized hypnosis as a valuable therapeutic technique since before the turn of the century.[1] Dentists have hypnotized patients instead of using anesthetic,[2] and obstetricians have, similarly, used hypnosis to relieve their patients' pain during childbirth.[3]

In recent years, law enforcement agencies, also, have found hypnosis useful, and it has developed into an important investigative tool.[4] Simultaneously, the evidentiary implications of its use have become one of the most controversial subjects in the criminal law arena.[5] To a lesser extent, hypnosis has been an issue in civil cases as well.[6] Because hypnosis can be used for different purposes in the context of a legal controversy,[7] the issues raised have varied.[8]

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*Associate Professor of Political Science, and Director, The Law Enforcement Program, University of Mississippi, B.S., Criminology, 1965, Florida State University, M.A., Sociology, 1970, University of Mississippi, Ph. D., Criminal Justice Administration, 1973, Sam Houston State University.

In 1979, Professor Quarles attended the Institute of Forensic Hypnosis (Martin Reiser, Director) in Los Angeles, California. Since that time, he has conducted six forensic hypnotic interviews in Mississippi in connection with criminal investigations.

[1] *See generally* G. Ambrose & G. Newbold, A Handbook of Medical Hypnosis 1-12 (3d ed. 1968) (discussing history of medical hypnotism); W. Kroger, Clinical and Experimental Hypnosis 1-5 (2d ed. 1977) (same).

[2] *See* G. Ambrose & G. Newbold, *supra* note 1, at 174-77 (discussing dental anesthetic); P. Blythe, Hypnotism—Its Power and Practice 105-11 (1971) (noting dental uses of hypnosis); W. Kroger, *supra* note 1, at 321-22 (same). *See generally* F. Marcusie, Hypnosis Throughout The World 274-77 (1964) (history of dental use of hypnosis in United States).

[3] *See* G. Ambrose & G. Newbold, *supra* note 1, at 266-67 (discussing use of hypnosis to relieve pain at childbirth); W. Kroger, *supra* note 1, at 227 (same); F. Marcusie, *supra* note 2, at 274 (same).

[4] M. Reiser, Handbook of Investigative Hypnosis 5-6 (1980). *See* H. Arons, Hypnosis in Criminal Investigations 3-10 (1967) (use of hypnosis in police investigations).

The scope of this article is limited to consideration of the admissibility of testimony from the hypnotically-induced witness. As the term is used in this article, "hypnotically-induced witness" refers to any person, other than the defendant in a criminal trial,[9] testifying from a memory that has been refreshed by hypnosis. Discussion is limited to this subject for primarily two reasons: First, the use of hypnotically-induced witnesses may be an issue in both criminal and civil cases and, thus, is a matter of potential concern to all lawyers. Second, as the following account illustrates,[10] the issue of the admissibility of testimony from a hypnotically-induced witness is an issue soon to be faced in Mississippi.

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[5] *Compare* Dilloff, *The Admissibility of Hypnotically Induced Testimony,* 4 OHIO N.U.L. REV. 1, 22-23 (1977) (hypnosis has serious dangers making testimony less credible) *with* Comment, *Hypno-Induced Statements: Safeguards for Admissibility,* 1970 LAW & SOC. ORDER 99, 119 (hypnotically-induced statements not less credible than other testimony).

[6] *See, e.g.,* Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (witnesses' memory refreshed by hypnosis in strict liability case); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509 (9th Cir. 1974) (testimony of passenger in helicopter crash who had received hypnotic treatments allowed).

[7] *See generally* W. BRYAN, LEGAL ASPECTS OF HYPNOSIS 193-226 (1962) (listing various applications of hypnosis to law).

[8] Legal treatment of the various issues is discussed in Annot., 92 A.L.R.3d 442 (1979) (admissibility of hypnotic evidence at criminal trial). For other discussions of the uses of hypnosis and issues raised, see the following: Diamond, *Inherent Problems in the Use of Pretrial Hypnosis on a Prospective Witness,* 68 CAL. L. REV. 313 (1980); Dilloff, *supra* note 5; Spector & Foster, *Admissibility of Hypnotic Statements: Is the Law of Evidence Susceptible?,* 38 OHIO ST. L.J. 567 (1977); Teitelbaum, *Admissibility of Hypnotically Adduced Evidence and the Arthur Nebb Case,* 8 ST. LOUIS U.L.J. 205 (1963); Comment, *supra* note 5; Comment, *Hypnosis as a Defense Tactic,* 1969 TOL. L. REV. 691; Comment, *Refreshing the Memory of a Witness Through Hypnosis,* 5 U.C.L.A.—ALASKA L. REV. 266 (1976).

[9] For a discussion of the rights of a criminal defendant to be hypnotized as an aid to preparing his defense, see Annot., 72 A.L.R.2d 1120 (1960) (attorney's right to be accompanied by psychologist or hypnotist when consulting with accused). *See also* Comment, *Hypnosis as a Defense Tactic, supra* note 8, at 694-96 (evolution of law as to use of hypnosis by defense in trials).

[10] This account is based on the author's personal knowledge. Certain facts have been changed to protect the identity of the child and to avoid prejudicing the ultimate disposition of the case in event of appeal.

In the summer of 1980, a southern Mississippi woman returned home following a short vacation. While handling the family laundry, she discovered blood on her daughter's underwear. Believing the child was prematurely menstruating, the mother sought to instruct her daughter accordingly. When the girl reacted negatively and became hysterical, the mother sought medical evaluation. The doctor concluded a vaginal penetration of some type had occurred. The child would only say that "a man" had hurt her.

When subsequent interviews with police officers and a psychiatric social worker failed to elicit further details from the girl, a hypnotist was contacted.[11] He obtained permission to hypnotize the child,[12] and through the use of relaxation techniques on her,[13] succeeded in achieving a relatively deep hypnotic induction.[14] In the hypnotic state the girl viewed the rape again, but as a spectator.[15] The hypnotist then asked her a series of questions about the incident.[16] Through them, the child gave significant details not given previously and eventually identified the "man" who had hurt her as her father.[17]

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[11] The District Attorney's personal investigator contacted the hypnotist.

[12] The hypnotist obtained a waiver of rights and a formalized agreement that suit would not be brought on any action arising out of the hypnosis. The permission to hypnotize was signed by the mother and the child agreed to cooperate.

[13] After the child was told that she would be made to feel very comfortable the induction began. Pre-hypnotic and post-hypnotic suggestions were given to her to relieve anxiety and guilt and to aid in eliminating the nightmares that were directly associated with the incident.

In any hypnotic induction, the subject must have the ability to be imaginative and to visualize relaxing scenes that may not be real. Thus, it is sometimes difficult to hypnotize children or persons of low intelligence. *See* W. KROGER, *supra* note 1, at 45 (imbeciles, senile persons, and children less than six years old difficult or impossible to hypnotize); M. TEITELBAUM, HYPNOSIS INDUCTION TECHNICS 32 (1965) (low intelligence inhibits ability to be hypnotized).

Many people seeking hypnosis relate very well to tranquil scenes on the beach or shore, or to beautiful scenes in mountainous areas. *See generally* J. GORDON, HANDBOOK OF CLINICAL & EXPERIMENTAL HYPNOSIS 51 (1967) (suggestions of relaxation and concentration facilitate effects of hypnotic induction). Since the present subject was from a low-income home, the imagery was limited. The image used was a featherbed at the home of the child's grandmother, upon which the child enjoyed relaxing. She always felt loved, confortable, and safe at her grandmother's home, which was many miles from where the rape occurred.

[14] There are several stages or depths in hypnosis. *See* notes 43 through 50 and accompanying text *infra*.

[15] The victim is not asked to experience emotionally the trauma of the incident

Subsequently, the child testified at her father's trial from this hypnotically-induced memory.[18] The hypnotist was not sub-

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again. A "disassociation technique" is used where the victim is in a safe environment with full police protection. She is able to visualize the past criminal occurrence through an imagined movie or television screen or through reading a book about what happened to her. The hypnotist can let the subject repeat all observations, feelings, and experiences and then "go back" or "play back" recent scenes just as if one were watching a televised sportscast. If the visualization is book-oriented, the inductee is asked to turn back to the pages of specific interest to the hypnotist. Great detail can be gleaned through television "stop-action" or through page fixation on the incident. The victim can be asked to concentrate deeply on the face of the perpetrator, his car, a tattoo, or some other identifying characteristic. *See generally* W. KROGER, *supra* note 1, at 75 (discussing use of television technique); M. REISER, *supra* note 4, at 158-62 (describing television and other retrieval techniques).

[16] In order that the danger of information being manufacturd may be reduced, leading questions should not be asked in forensic hypnosis interviews. *See* notes 61, 62 and accompanying text *infra; cf.* State v. Hurd, 173 N.J. Super. 333, 414 A.2d 291, 306 (Super. Ct. Law Div. 1980) (standard for admissibility of hypnotically-induced recollection precludes hypnotist from giving information or suggestions to witness).

[17] The following are the actual questions asked and answers given during the part of the interview leading up to identification:

Interviewer: "Did you see the face of the man who hurt you?"
Victim: "Yes."
Interviewer: "Do you know who he is?"
Victim: "Yes."
Interviewer: "Do you know his name?"
Victim: "Yes."
Interviewer: "Will you tell me his name?"
Victim: "Yes."
Interviewer: "What is his name?"
Victim: "Daddy."

[18] It is frequently the case that, once the information has been elicited under hypnosis, the witness will remember the same details afterward, even though he was unable to remember before the hypnosis. *See* H. ARONS, *supra* note 4, at 28-29 (amnesia easily dispelled by hypnosis); *see, e.g.,* Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975) (witness' amnesia caused by severe head injuries overcome by hypnosis). If the witness is later unable to remember the facts revealed by the hypnosis, it is possible that a court would allow the hypnotist to testify regarding the statements made during the hypnotic session, under the "statements made to a physician" hearsay exception, FED. R. EVID. 803(4). *See* Spector & Foster, *supra* note 8, at 604-06 (hypno-induced statements made to psychiatrists should be admissible under statements to physician exception) (citing United States v. Techoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976) (statements to psychiatrists within purview of FED. R. EVID. 803(4)).

poenaed and the matter of the hypnosis was not raised at trial.[19] The defendant was convicted and is serving time in the state penitentiary at Parchman.

At present, Mississippi has no statutes and no case law addressing the issue of hypnosis.[20] The continued use of investigative procedures such as those described in the preceding account make it inevitable that the issue will be raised in the near future.[21] The purpose of this article is to help prepare Mississippi lawyers and judges for that event.

II. Hypnosis

A. *Definition*

Although hypnosis has been practiced for centuries,[22] the modern theory lacks a precise definition.[23] An understanding of

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[19] The defense attorney, judge, and prosecuting attorney were all aware that the hypnosis had taken place. It has been held that there is a duty to disclose the pre-trial hypnosis of a witness. *See* United States v. Miller, 411 F.2d 825, 830-31 (2d Cir. 1969) (defendant's motion for new trial granted where state failed to disclose pre-trial hypnosis of prosecution witness).

[20] The Office of the Attorney General has issued an opinion that indicates that hypnotically obtained evidence might be admissible in certain instances. *See* note 83 *infra* (text of opinion).

[21] At the present time there are, at best, 18 graduates of the Institute of Forensic Hypnosis who are working in Mississippi police, sheriff, or district attorney's offices. Several graduates of other professionally acceptable schools work in Mississippi as well.

The author has conducted five forensic hypnotic interviews in Mississippi at the time of this writing. All of the subjects interviewed were crime victims and included prepubertal homosexual and heterosexual rape victims, as well as victims of armed robbery.

[22] *See* Ladd, *Legal Aspects of Hypnotism*, 11 YALE L.J. 173, 174 (1902) (hypnotism is as old as human history and as widespread as the race).

[23] Varying definitions have been given by commentators on forensic hypnosis. *See, e.g.*, H. ARONS, *supra* note 4, at 20 (concentrated suggestibility); Dilloff, *supra* note 5, at 3 (reduced state of consciousness); 14 VAND. L. REV. 1509, 1510 (1961) (exaggerated suggestibility). *See generally* H. SPIEGEL & D. SPIEGEL, TRANCE AND TREATMENT 11-34 (1978) (defining hypnosis); Diamond, *supra* note 8, at 316 (1980) (characteristics of hypnosis).

Even more varied than the definitions of hypnosis are the theories of the phenomenon. In 1890, the well-known London physician St. Clair Thompson hypothesized that hypnotism was "a disease which effects the nervous system." Thompson, *The Dangers of Hypnotism*, 9 WESTMINISTER REV. 624, 626 (1890), *cited in* 14 VAND. L. REV. 1509, 1509 (1961). The following excerpt states many of the modern theories of hypnosis:

> [T]here are the hereditary models which conceive of hypnosis as an inherited characteristic that reflects a phylogenetic and regressive group of qualities and

the phenomenon may be reached by considering how hypnosis affects the subject. In a hypnotic trance there is an alteration in consciousness and concentration,[24] yet the subject continues to maintain awareness.[25] Additionally, the subject manifests a higher degree of susceptibility.[26] Susceptibility, or suggestibility, is the most important element of the hypnotic trance and is characterized by the subject's willingness to respond to suggestion.[27] Therefore, hypnosis occurs when the hypnotist's suggestions elicit responses from the hypnotic subject.[28] Physical symptoms usually include listlessness or lethargy, fluttering of the eyelids, increase in heartbeat, and an increase in the rate of breathing.[29]

> traits . . . . There is a physiological model which conceives of hypnosis as a product of . . . the brain, such as areas of inhibition and areas of excitation, or the action of the reticular activating system. There is an internal environmental model which deals with the exchanges and interchanges of biochemical substances in the neural system throughout the brain. There is a learning model that conceives of hypnosis as a form of learning, like conditioning. There is a cultural social model which explains hypnosis in terms of contagious suggestibility and role-playing. There is a developmental motivational model which deals with various interpersonal and intrapsychic dimensions, such as dissociation and ontogenetic regression to earlier modes of thinking, feeling and behavior, involving an anachronistic revival of the child-parent relationship and related transference phenomena.

M. KLINE & L. WALBERG, THE NATURE OF HYPNOSIS: CONTEMPORARY THEORETICAL APPROACHES 6 (1962), *quoted in* Spector & Foster, *supra* note 8, at 569. *See generally* W. KROGER, *supra* note 1, at 26-32 (discussing theories of hypnosis); M. TEITELBAUM, *supra* note 13, at 8-15 (same).

[24] Spector & Foster, *supra* note 8, at 570.

[25] D. CHEEK & L. LECRON, CLINICAL HYPNOTHERAPY 13 (1968).

[26] *See generally* W. KROGER, *supra* note 1, at 7-8 (discussing the nature of suggestibility in hypnosis).

[27] Spector & Foster, *supra* note 8, at 570. Although the popular belief is that weak-willed persons or those who are accustomed to blind obedience make the best subjects, the consensus among scientists and physicians engaged in the research of hypnotism is that the overwhelming majority of people are hypnotizable. *Id.* at 575. The essential element is concentration. *See* Allen, *Hypnotism and Its Legal Import*, 12 CANADIAN B. REV. 14, 16 (1934) (susceptibility is dependent upon concentration); Ladd, *supra* note 22, at 175 (poor subjects are incapable of maintaining the requisite degree of concentration).

Tests are often used to assess an individual's susceptibility to hypnotism. For a discussion of the various tests, see H. SPIEGEL & D. SPIEGEL, *supra* note 23, at 35-150.

[28] Spector & Foster, *supra* note 8, at 570.

[29] *Id.* at 570-71. The rapidity of heartbeat and rate of breathing is explained as a function of apprehension by the subject of the new sensation. *Id.*

B. *The Process of Hypnotic Induction*

Induction has been described as "the entire body of events used for the communication of information from a hypnotist to his subject."[30] The techniques[31] used result in hypnosis and are designed to elicit the responses desired from the subject.[32] To begin the process the hypnotist should attempt to put the subject at ease by engaging in a discussion of the purpose of the session.[33] Any misconceptions regarding hypnosis may be clarified,[34] and the operator may explain the nature of activities in which the subject will be asked to engage or the type of questions he will be requested to answer.[35] The process continues with the operator's rhythmic, soothing instructions to relax.[36] Encouragement is mixed with suggestions that the subject is becoming sleepy.[37] As the subject responds, more difficult behavior tests are administered,[38] generally accompanied by continuous "patter" that suggests relaxation and the ability to listen and respond to the operator.[39] The completion of induction is not readily distinguishable from the hypnotic state, for there is no precise moment where the former ceases and the latter becomes operative.[40] As the trance deepens, however, the hypnotist's need to emphasize that the subject attend to his suggestions decreases.[41] Additionally, the subject loses any self-conscious awareness of his perceptions.[42]

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[30] J. Gordon, *supra* note 13, at 74.

[31] Induction principally is accomplished verbally, but at least two other modes have been used successfully. *Id.* at 58. The discussion in the text centers upon the verbal mode since it is the primary mode used for the delivery of induction in modern hypnosis. *Id.* Gordon describes the other techniques as follows:

> *Physical contact,* in which some portion of the signal delivery is supported by manipulating the subject physically to suggest or compel a compliant response, or to reinforce a suggested response when it occurs.
>
> *Sensory-perceptual manipulation,* in which gadgets, devices, or machines are employed to capture the attention of the subject and mechanically increase receptiveness to the induction signal.

Id.

For other discussions of induction techniques, see G. Estabrooks, Hypnotism 24-30 (1957); M. Teitelbaum, *supra* note 13, at 19-86.

[32] J. Gordon, *supra* note 13, at 74.

[33] *Id.* at 59. The conversation should allow the subject to adjust to his surroundings. *Id.*

[34] *Id.* Some common misconceptions are that the subject will be controlled by the operator, that hypnosis is a state of sleep, and that hypnosis is a physiological condition. *See* H. Arons, *supra* note 4, at 11-20 (refuting these beliefs); W. Kroger, *supra* note 1, at 36-37 (same).

[35] If a person is known to be excessively frightened by the use of hypnosis, the operator may indirectly induce the subject into a trance without advance discussion. J. Gordon, *supra* note 13, at 60.

[36] *Id.* The subject is usually instructed to fix his gaze or concentration on one particular thing. *Id.*

[37] *Id.* When the initial instructions appear to be having effect, the operator adds suggestions that the subject will respond to the hypnotist during his "sleep" and will not "awaken" until instructed to do so. *Id.*

C. *Hypnotic States*

The hypnotic state is separable into six depths or levels,[43] each characterized by the mental and physical acts the subject is capable of performing at the particular level.[44] The first two stages involve a light or hypnoidal trance in which relaxation and muscular lethargy are experienced.[45] In the third and fourth stages, the subject will experience varying degrees of insensitivity to pain yet will retain the sense of touch.[46] By the fourth stage the subject will be susceptible to the hypnotist's suggestion that he is incapable of remembering.[47] In the fifth stage, the first stage of heavy trance, the subject may hallucinate in response to the suggestion of the hypnotist, and he will no longer experience touch or pain when so directed.[48] In the sixth stage, the deepest trance,[49] the subject may hallucinate spontaneously and, at the hypnotist's suggestion, lose his ability to see objects presented to him.[50]

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[38] *Id.* These tests include suggestions that the subject will be unable to open his eyes, raise an arm, rise from a chair, stop rotating his hands in a circular motion, or stop repeating a phrase initiated by the operator. *See* G. ESTABROOKS, *supra* note 31, at 25-28. When the subject responds positively to one test, the operator may continue to the next test. *Id.*

[39] J. GORDON, *supra* note 13, at 60.

[40] *Id.* at 74.

[41] *Id.* at 74-75.

[42] *Id.* at 75. The conclusion is that "induction terminates only in the sense that explicit tuning operations [by the hypnotist] are reduced in frequency." *Id.*

[43] H. ARONS, *supra* note 4, at 137.

[44] *Id.* The operator must be able to ascertain the stage of trance depth since certain information-eliciting techniques and verification procedures depend on the depth achieved. *Id.*

[45] Comment, *Hypnosis as a Defense Tactic, supra* note 8, at 693.

[46] *Id.* Upon suggestion that his arm is under anesthetic, the subject should feel no pain when pinched, though he will feel the touch. H. ARONS, *supra* note 4, at 137-38.

[47] H. ARONS, *supra* note 4, at 138. The subject will forget familiar information, such as the day of the week and his address, when the operator suggests he has forgotten this data. *Id.*

D. *Limitations on the Use of Hypnosis to Refresh Memory*

It is generally accepted that the process of hypnosis has great investigative potential.[51] An eyewitness to an automobile accident or the victim of a criminal assault may be unable to recall significant details of the occurrence, even though he was fully conscious at the time.[52] Under optimum conditions, a trained hypnotist can obtain all or part of the forgotten details.[53] The value of such infomation for investigative purposes, especially in criminal cases, is clear.

When the hypnotic subject is not simply the source of helpful information, but testifies at trial from his hypnotically-refreshed memory, certain limitations on the accuracy of that memory must be considered. Several factors can serve to distort the results of the hypnotic interview, although precautions can be taken to reduce the likelihood of distortion occurring.[54]

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[48] *Id.*

[49] The deepest stage of hypnotism is also called somnambulism. Somnambulism is ordinarily associated with amnesia; acts are performed without later recognition. For a discussion of the physical characteristics that accompany somnambulism, see W. KROGER, *supra* note 1, at 20.

[50] H. ARONS, *supra* note 4, at 138. There are a variety of other scales that categorize trance depth. *See generally* W. KROGER, *supra* note 1, at 50-52 (discussing scales measuring trance depth); M. REISER, *supra* note 4, at 97-101 (same).

[51] *See* Teitelbaum, *supra* note 8, at 214 (hypnosis has potential as investigative technique, regardless of courtroom use); Comment, *Hypnosis as a Defense Tactic, supra* note 8, at 708 (hypnosis useful to obtain information for criminal defense).

[52] *See, e.g.,* Kline v. Ford Motor Co., 523 F.2d 1067, 1069-70 (9th Cir. 1975) (amnesia resulting from trauma incident to auto accident); Harding v. State, 5 Md. App. 230, 246 A.2d 303, 311-12 (girl who was shot and raped could not recall crime), *cert. denied,* 395 U.S. 949 (1968); H. SPIEGEL & D. SPIEGEL, *supra* note 23, at 296-97 (insurance company settled in auto accident when boy under hypnosis recalled wreck killing father).

Crime victims, especially in the more violent offenses, often suffer from amnesia or repression. This is a natural defense reaction allowing the victim to avoid emotionally disturbing memories. M. REISER, *supra* note 4, at 115-16.

[53] *See* M. TEITELBAUM, *supra* note 13, at 141-42 (memory recall through hypnosis by regressing subject to time of incident). Under hypnosis, memory involving imagery systems (as opposed to verbal systems) may be retrieved as originally viewed. M. REISER, *supra* note 4, at 114. As a result, the victim may be able to recall minute details of the event. *See, e.g.,* H. ARONS, *supra* note 4, at 39-48 (using hypnosis to obtain license plate numbers).

First, the hypnotic subject may be the source of inaccuracy. He may confabulate,[55] have memory distortions,[56] or feign the depth of hypnosis and lie.[57] The subject's subsequent testimony, therefore, will be confabulated, distorted, or false to the same extent. The likelihood of confabulation or distortion occurring, however, is small.[58] Further, it should be noted that a witness who has never been hypnotized may give inaccurate testimony in exactly the same ways.[59] To prevent deception by outright lying, the hypnotist may employ one or more tests or safeguards.[60]

The hypnotist may also be a source of inaccuracy.[61] If he is predisposed to obtaining a particular result, or asks leading questions, he may influence the subject, who is in a highly suggestible state, to give false information.[62] The hypnotist may also obtain false answers if he is using unreliable techniques.[63] These problems are primarily the result of faulty methodology. Accordingly, many law enforcement agencies and courts have set requirements for acceptable hypnotic interviews that minimize the likelihood of the hypnotist influencing what the potential witness recalls.[64]

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[54] *See* Comment, *Refreshing the Memory of a Witness Through Hypnosis, supra* note 8, at 278-79 (subject may be programmed to respond in identifiable manner when giving inaccurate information).

[55] Dellinger, *Investigative Hypnosis: Tapping Our Cerebral Memory Banks,* HUMAN BEHAVIOR, Apr., 1978, at 36-37. Confabulation occurs when a person fills in gaps in the memory with fabricated facts. Dilloff, *supra* note 5, at 5.

[56] Dilloff, *supra* note 5, at 5; *see* Diamond, *supra* note 8, at 314, 332-42 (subject cannot restrict memory only to facts).

[57] Dilloff, *supra* note 5, at 6; *see* Diamond, *supra* note 8, at 332-42 (impossible to determine whether subject is pretending to be hypnotized).

[58] One study found that in 151 cases in which follow-up information was available, 90.1% of the information obtained was later verified. M. REISER, *supra* note 4, at 184.

[59] This has been cited as a reason to find that previous hypnosis should be a consideration of weight, not admissibility. *See, e.g.,* United States v. Adams, 581 F.2d 193, 198 (9th Cir. 1978) (hypnosis affects only credibility); Clark v. State, 379 So. 2d 372, 375 (Fla. Dist. Ct. App. 1979) (same); People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848, 853 (1979) (same); State v. Temoney, 45 Md. App. 569, 414 A.2d 240, 244 (1980) (same).

[60] *See generally* Comment, *Hypnosis as a Defense Tactic, supra* note 8, at 700-02 (discussing safeguards to prevent deception).

[61] *See* Dilloff, *supra* note 5, at 7-8 (dangers associated with hypnotist).

[62] *Id.* at 4.

[63] *Id.* at 8. The author suggests that the hypnotist should use standardized procedures and remain unaware of desired responses. *Id.*

A final factor that may lead to inaccurate results is the physical environment in which the hypnosis takes place. If the subject is aware that he is being questioned in a police station, for example, he may be influenced to give responses consistent with the police's predisposition.[65] The danger of such influence occurring can be removed by questioning the subject in as neutral surroundings as possible or keeping influential information from him.[66]

III. ADMISSIBILITY OF HYPNOTICALLY-INDUCED TESTIMONY

A. Statutes

In general, the issue of hypnosis has been left to the courts. Oregon is the only state having a substantive statute specifically dealing with investigative hypnosis.[67] The statute pertains to criminal proceedings only and requires that two conditions be met before a court admits testimony from a person previously hypnotized concerning the subject matter of the proposed testimony.[68] First, the hypnosis procedure must be recorded,[69] and,

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[64] *See* notes 88, 100 and accompanying text *infra* (safeguards used in courts).

The FBI's policy basically states that the FBI is to use hypnosis only in select cases. This would include bank robbery where force is used or a large amount of money is involved, kidnapping, extortion, and crimes of violence that occur where the FBI has jurisdiction. Hypnosis is confined to use with key witnesses or victims of crimes only. No one who has the potential of becoming a suspect or subject in a case is to be hypnotized for any reason.

The FBI uses only highly qualified hypnotists. The use of hypnosis must be discussed with the U.S. Attorney and his permission obtained. The U.S. Attorney must then obtain written permission from the Assistant Attorney General of the Criminal Division, U.S. Department of Justice. The current policy also states that no agent may participate in a hypnotic interview without written permission from the Attorney General. Further, the hypnotic interview must be recorded in its entirety, either by audiotape or videotape, with videotape being the preferred method. FBI LAW ENFORCEMENT BULL. Jan., 1980 at 5-8.

[65] In Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), *cert. denied,* 395 U.S. 949 (1969), the police interviewed the witness in a police barracks. 246 A.2d at 308. Despite the apparent danger of suggestion, the court accepted testimony from the witness. *Id.* at 312.

[66] Dilloff, *supra* note 5, at 8.

[67] The statute is codified at OR. REV. STAT. §§ 136.675-.685, .695 (1979).

[68] OR. REV. STAT. § 136.675 provides:

> If either prosecution or defense in any criminal proceeding in the state of

second, the recording must be made available to the other party or parties.[70] The statute also requires that, in certain instances, the prospective subject must receive warnings about hypnosis, be informed he is free to refuse hypnosis,[71] and be told he may have the hypnosis procedure performed by a medical doctor or psychologist.[72]

There is no federal statute dealing with the subject, although the rules of evidence for courts-martial do exclude certain evidence related to hypnosis.[73]

> Oregon intends to offer the testimony of any person, including the defendant, who has been subjected to hypnosis, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness relating to the subject matter of the proposed testimony, performed by any person, it shall be a condition of the use of such testimony that the entire procedure be recorded either on videotape or any mechanical recording device. The unabridged videotape or mechanical recording shall be made available to the other party or parties in accordance with ORS 135.805-135.990.

[69] OR. REV. STAT. § 136.675. The statute requires that the entire hypnosis procedure be recorded on videotape or any other mechanical recording device. *Id.*

[70] *Id.* The entire unabridged recording must be made available to the opposing party. *Id.*

[71] *Id.* § 136.685. The statute provides:

> (1) No person employed or engaged in any capacity by or on behalf of any state or local law enforcement agency shall use upon another person any form of hypnotism, mesmerism or any other form of the exertion of will power or the power of suggestion which is intended to or results in a state of trance, sleep or entire or partial unconsciousness without first explaining to the intended subject that:
>
> > (a) He is free to refuse to be subject to the processes delineated in this Section;
> >
> > (b) There is a risk of psychological side effects resulting from the process;
> >
> > (c) If he agrees to be subject to such processes, it is possible that the process will reveal emotions or information of which he is not consciously aware and which he may wish to keep private; and
> >
> > (d) He may request that the process be conducted by a licensed medical doctor or a licensed psychologist, at no cost to himself.
>
> (2) In the event that the prospective subject refuses to consent, none of the processes delineated in Subsection (1) of this Section shall be used upon that person.

[72] *Id.*

[73] MANUAL FOR COURTS-MARTIAL ¶ 142(e) (1969).

B. *Case Law*

The question of the use of hypnosis as an investigative aid was first considered in *People v. Ebanks*[74] in 1897. In that case, the defense attempted to introduce testimony from an expert witness who had hypnotized the defendant.[75] The defendant had denied his guilt while in the hypnotic trance.[76] The court refused to admit the testimony, stating that the law of the United States did not recognize hypnotism.[77]

For sixty years, *Ebanks* remained the law. Cases involving witnesses or others influenced by hypnosis continued to be litigated and appealed to no avail.[78] In 1959, the landmark decision in *Cornell v. Superior Court*[79] opened the door to the use of hypnosis. The court in *Cornell* held that a criminal defendant has a right to be examined by his own counsel with the aid of a hypnotist, to assist in preparing his defense.[80] Subsequently, defendants were allowed to use hypnotic interviews for a variety of purposes, the most extreme example occurring in *State v. Nebb,*[81] where the defendant was hypnotized in court and testified while under hypnosis.[82]

When courts have faced the question of whether to admit testimony from a witness, other than the defendant in a criminal case, whose memory has been refreshed by hypnosis, they have generally decided in favor of admissibility.[83] The fact that a witness testifies to events recalled only after he has been hypnotized has been held to be a matter of credibility and not one of admissibility.[84] In admitting such testimony, however, courts have been careful to distinguish testimony from a witness' present memory, which has previously been hypnotically-refreshed, from testimony about out-of-court statements made by the subject while under hypnosis.[85] The latter has generally been excluded.[86] The courts admitting hypnotically-induced testimony have been aware of the dangers involved.[87] Instead of excluding

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[74] 117 Cal. 652, 49 P. 1049 (1897). In a trial for murder, defendant claimed to have been intoxicated at the time of the incident and to have no memory of its occurrence. 49 P. at 1051.

[75] 49 P. at 1053.

[76] *Id.*

[77] *Id.* The court stated that hypnosis was an illegal defense. *Id.*

[78] *See, e.g.,* State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, 522 (1950) (statements made while in hypnotic trance clearly inadmissible); State *ex rel.* Sheppard v. Koblentz, 174 Ohio St. 120, 187 N.E.2d 40, 42 (1962) (denial of prisoner's request to be hypnotized not abuse of discretion).

[79] 52 Cal. 2d 99, 338 P.2d 447 (1959).

[80] 338 P.2d at 449. *Cornell* was not the first decision to allow use of hypnosis in a case. Hypnosis was an issue in State v. Exum, 138 N.C. 599, 50 S.E. 283 (1905). In that case, a wife was permitted to testify on behalf of her husband, the accused, and the fact that he previously had hypnotized her on several occasions only bore on her credibility. 50 S.E. at 285-86.

[81] No. 39,540 (Ohio Com. Pl., Franklin County, May 28, 1962) *discussed in* Teitelbaum, *supra* note 8, at 206.

[82] No. 39,540 (Ohio Com. Pl., Franklin County, May 28, 1962) *discussed in* Teitelbaum, *supra* note 8, at 208.

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[83] Annot., *supra* note 8, at 446; *see, e.g.*, United States v. Awkard, 597 F.2d 667, 669 (9th Cir.) (witness, one of several inmates who stabbed victim, allowed use of pretrial hypnosis to refresh recollection), *cert. denied*, 444 U.S. 885 (1979); United States v. Adams, 581 F.2d 193, 194 (9th Cir.) (eyewitness' post-hypnosis statement regarding a murder and robbery is admissible), *cert. denied*, 439 U.S. 1006 (1978); Kline v. Ford Motor Co., 523 F.2d 1067, 1070 (9th Cir. 1978) (allowed testimony of witness, suffering from amnesia, who had undergone pretrial hypnosis); Wyller v. Fairchild Hiller Corp., 503 F.2d 506, 509-10 (9th Cir. 1974) (helicopter passenger, sole survivor of crash, allowed to testify from hypnotically-refreshed memory of event that occurred four years previous to trial); United States v. Narciso, 446 F. Supp. 252, 282 (E.D. Mich. 1977) (hypnotic recollection of elderly alcoholic patient ruled admissible); Clark v. State, 379 So. 2d 372, 374-75 (Fla. Dist. Ct. App. 1979) (victim's identification of defendant allowed from hypnotically-refreshed memory); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240, 241-42 (1974) (hypnotic subject allowed to testify from refreshed memory); People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848, 852-53 (1979) (murder witness' identification of defendant was not rendered inadmissible by her hypnosis prior to identification); State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 427-28 (1978) (prostitute, only eyewitness, allowed to testify from hypnotically-refreshed memory of events occurring five years previous to trial); People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979) (rape victim's testimony, hypnotically-induced recollection, not inadmissible as a matter of law); State v. Jorgensen, 8 Or. App. 1, 492 P.2d 312, 315 (Ct. App. 1971) (hypnosis and sodium amytol used to refresh memory of witness to double murder not basis for disallowing testimony).

An opinion issued by the Mississippi Attorney General's office indicates that Mississippi would follow suit:

> The question has arisen as to the use of hypnosis in police work being legal in the State of Mississippi.
>
> . . . .
>
> On a nationwide basis, investigative use of hypnosis appears to be increasing. *See generally*, Admissibility of Hypnotic Evidence at Criminal Trial, 92 A.L.R.3d 442 (1979). Mississippi law does not appear explicitly to authorize or to condemn the practice as an investigative tool. As a device for ferreting out facts there is nothing inherently illegal about it. The only true yardstick of the utility of an investigative tool, however, is its ability to discover evidence admissible in a court of law. When measured by that standard, hypnosis does not fare well at all.
>
> . . . .
>
> Apparently the only use for hypnosis which the courts have sanctioned with consistency is its out-of-court use to refresh the recollections of a witness who subsequently testifies in-court, without the use of hypnotism, about what he remembers. Such a lack of memory normally arises either when a witness has been traumatized by an especially heinous crime which is then blocked from his memory or when the passage of time since the incident has been great, and memories are therefore clouded. Out-of-court hypnosis can then be used to refresh the witness's memory. *State v. McQueen,* 244 S.E.2d 414 (N.C. 1978).
>
> . . . .

> In Mississippi, therefore, hypnosis is a valid investigative tool of limited efficacy. As with any investigative tool, misuse by the police can result in liability for the policeman and, under certain circumstances, for the city as well. The potential for liability for misuse of hypnosis is heightened when the practitioner is not professionally qualified as a psychologist, psychiatrist or medical doctor. *See* Hypnosis in the Courtroom, American Medical News, November 24, 1978.
>
> It is the opinion of this office that hypnosis as an investigative tool is valid and that public and personal liability for its misuse is possible, just as it is possible for the misuse of any police tool.

Letter from J. Stephen Wright, Spec. Ass't Atty. Gen. to W.E. Felts, City Clerk, City of Indianola, Mississippi (March 7, 1980).

[84] *See* cases cited in note 59 *supra.*

[85] *Compare* State v. McQueen, 295 N.C. 96, 244 S.E.2d 414, 429 (1978) (hypnotically-refreshed testimony of witness as to present memory admissible) *with* Greenfield v. Commonwealth, 214 Va. 710, 204 S.E.2d 414, 419 (1974) (hypnotic evidence in form of subject testifying under hypnosis or another testifying as to what subject said not admissible).

[86] Annot., *supra* note 8, at 446; *see, e.g.*, Rodriguez v. State, 327 So. 2d 903, 904 (Fla. Dist. Ct. App. 1976) (statements made while witness under hypnosis not admissible); Emmett v. State, 232 Ga. 110, 205 S.E.2d 231, 235 (1974) (same); Creamer v. State, 232 Ga. 136, 205 S.E.2d 240, 241 (1974) (same); State v. Harris, 241 Or. 224, 405 P.2d 492, 498 (1965) (same); *cf.* State v. Pusch, 77 N.D. 860, 46 N.W.2d 508, 521-22 (1950) (testimony concerning results of hypnotic examination not admissible to show truth of matter asserted); Jones v. State, 542 P.2d 1316, 1326 (Okla. Crim. App. 1975) (hypnotist could testify about similarity between witness' statements at trial and under hypnosis, but not specific replies). *But cf.* United States v. Lechoco, 542 F.2d 84, 89 n.6 (D.C. Cir. 1976) (statements made to psychiatrist during treatment admissible under hearsay exception).

[87] The court in Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), allowed hypnotically-induced testimony even though "fancy can be mingled with fact in some cases." 246 A.2d at 312. Again, in People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643 (Onondaga County Ct. 1979), the court allowed the testimony, admitting that "hypnotic age regression . . . produces a ' . . . tendency to confabulate, [i.e.,] to fill in those aspects which the individual cannot remember in an effort to comply with the suggestions of the hypnotist.' " 417 N.Y.S.2d at 646.

The court in People v. Smrekor, 68 Ill. App. 3d 379, 385 N.E.2d 848 (1979), stated that:

the testimony, they have chosen to set guidelines that must be met before such testimony is admitted.[88]

Thus, in *United States v. Adams*,[89] the Ninth Circuit Court of Appeals emphasized the importance of exercising great care in using hypnosis to refresh memory.[90] While reaffirming that hypnosis is relevant to credibility but not admissibility,[91] the court

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> [T]he use of hypnosis is not without problems. 'Asking a patient to recall only real events, or to verify aspects of the material as true or false, reduces but does not remove the element of fantasy' . . . . The hypnotized subject is also subject to suggestion by the hypnotist. Despite these infirmities, the courts in *Harding, Jorgensen* and *Narciso* ruled the testimony of the formerly hypnotized subject to be admissible . . . .

385 N.E.2d at 853; *see* note 83 *supra*. Recognizing the hazards involved with hypnosis, the court in Kline v. Ford Motor Co., 523 F.2d 1067 (9th Cir. 1975), concluded that "[a]lthough the device by which recollection was refreshed is unusual, in legal effect her situation is not different from that of a witness who claims that his recollection of an event that he could not earlier remember was revived when he thereafter read a particular document." *Id.* at 1069-70.

[88] One court stated that "evidence elicited through hypnosis can be valuable" if there is "general acceptance in the scientific community and adequate procedural safeguards to insure reliability." People v. Hughes, 99 Misc. 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979). The court listed the following safeguards:

> (1) Only a psychiatrist or psychologist with special training in the use of hypnosis should carry it out and, to minimize bias and suggestiveness, the hypnotist should be given, in writing, only such facts as are necessary to conduct the session. (2) *All* contact between the hypnotist and his subject should be videotaped. (3) No one other than the hypnotist and the subject should be present because of the danger that observers will inadvertently communicate to the subject. (4) Prior interrogations should be tape recorded so that it is possible to document that the witness has not been cued, explicitly or implicitly, about information which is then reported for apparently the first time during hypnosis.

417 N.Y.S.2d at 647. In Harding v. State, 5 Md. App. 230, 246 A.2d 302 (Ct. Spec. App. 1968), the court affirmed a conviction, holding that the hypnotically-refreshed testimony was sufficient to support the jury's verdict. 246 A.2d at 312. In so holding, the court noted that "(1) the hypnosis procedure was fully exposed in the evidence; (2) the man who induced the hypnosis was a professional psychologist and gave his opinion that there was no reason to doubt the truth of the witness' statement; (3) there was sufficient corroboration of the witness' testimony . . . ." *Id.*

[89] 581 F.2d 193 (9th Cir. 1978).

[90] *Id.* at 198-99. The court stated that "[g]reat care must be exercised to insure that statements after hypnosis are the product of the subject's own recollections, rather than of recall tainted by suggestions received while under hypnosis." *Id.*

[91] *Id.* at 198. The court previously had so held in a civil case, Kline v. Ford Motor Co., 523 F.2d 1067, 1069 (9th Cir. 1975). *Adams* was the first time the issue had been raised before the Ninth Circuit in the criminal context. 581 F.2d at 198.

suggested that minimum standards must be met.[92] The court indicated it would prefer a videotape or tape recording of the entire hypnosis procedure, but would accept a complete stenographic record that included the identity of persons present, questions asked, and responses given.[93] The court's disapproving reference to the fact that the hypnotist in *Adams* was "uncertified"[94] indicates a preference for better credentials, although no specific recommendations in this regard were given.

In *United States v. Miller,*[95] the Second Circuit Court of Appeals required a new trial where the government failed to disclose that its principal witness was testifying from a hypnotically-refreshed memory.[96] At the same time, the court pointedly remarked, "Nothing in [this] decision is to be taken as implying any view that [the witness'] hypnosis disqualifies him from testifying on a new trial."[97] The court's primary concern was that the effect of the hypnosis on the credibility of the witness was an issue that should have been presented to the jury.[98]

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[92] The court stated, "[W]e do not approve of the hypnosis methods used here . . . ." 581 F.2d at 199. The court, however, did not reject the testimony on that ground, since the objection made in this case was to the reliability of the testimony given by one who had been hypnotized, rather than to the adequacy of the foundation laid. *Id.*

[93] *Id.* at 199 n.12.

[94] *Id.* at 199 n.13. At least one commentator has suggested that only medical professionals or licensed psychologists be accepted as hypnotists by the courts. Dilloff, *supra* note 5, at 7. There are reasons, however, that the non-medical, investigative hypnotist might be preferable. First, the well-trained forensic hypnotist is better able to guard against leading questions or suggestibility during hypnotic sessions. He has already learned to avoid the "leading-question syndrome." The hypno-therapist, however, is quite likely to use suggestive discourse as a dimension of his normal inquiries with his patient. Second, a forensic hypnotist is familiar with the elements necessary to prove a crime and can focus the hypnotic interview accordingly. *See generally* M. REISER, *supra* note 4, at 75-77 (differences in qualifications of investigative and therapeutic hypnotist).

[95] 411 F.2d 825 (2d Cir. 1969).

[96] *Id.* at 832-33.

[97] *Id.* at 832 n.15.

[98] *Id.* at 832. The court, in requiring a new trial, stated that:

> [T]he hypnosis had arguably placed at least some obstacle in the way of one of the most valuable protections accorded [the defendant] by the Sixth Amendment—the possibility that the sanctity of the oath and effective cross-examination might lead [the witness] to recant his identification or at least admit doubt. The defense could and very likely would have made this the capstone of its attack . . . .

Id.

State courts that have admitted hypnotically-induced testimony likewise have considered the fact of hypnosis to be an issue of credibility[99] and have constructed guidelines for its use.[100]

In *State v. Jorgensen*,[101] testimony was permitted from a woman whose memory was restored through hypnosis and sodium amytol.[102] A key factor in the court's decision was the fact that the witness was subjected to a lengthy and detailed cross-examination in open court.[103] The court noted that the hypnotic interviews were conducted by duly licensed physicians,[104] and that a tape of the interview was available and was played to the jury.[105] Under these circumstances, the court held the fact of the witness' hypnosis went to the weight and not the admissibility of her testimony.[106]

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[99] *See, e.g.*, Emmett v. State, 232 Ga. 110, 205 S.E.2d 231, 235 (1974) (mere fact of hypnosis did not taint testimony so as to render it inadmissible); People v. Hughes, 99 Misc. 2d 863, 417 N.Y.S.2d 643, 648 (Onondaga County Ct. 1979) (testimony consisting of hypnotically-induced recollection not inadmissible as matter of law).

[100] In People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177 (N.Y. County Ct. 1980), the court enumerated the following guidelines: (1) the hypnotic session should be administered by a mental health expert trained in hypnosis; (2) the hypnotist should be informed by written memorandum of only those facts of the case that would be essential for questioning the subject; (3) the hypnotist should be a neutral party, unconnected with either the prosecution or the defense; (4) all contact between the hypnotist and the subject should be videotaped; (5) no one connected with either the prosecution or the defense should be present during the session; (6) prior to the session the subject should be examined by a mental health professional to assure that the subject is free from any physical or mental disorder and understands the procedure he will undergo; (7) prior to hypnosis the hypnotist should obtain from the subject a detailed description of the facts as the subject believes them to be; (8) the hypnotist should strive to avoid adding any elements to the subject's testimony and should take care not to convey any cues before, during, or after the procedure; (9) evidence tending to corroborate or to challenge the statements made during the trance should be considered. 427 N.Y.S.2d at 179.

[101] 8 Or. App. 1, 492 P.2d 312 (1971).

[102] 492 P.2d at 315. According to psychiatric testimony offered by the state, the witness suffered a loss of memory as the result of trauma produced by her involvement in the events surrounding the murder of a young couple. In her testimony, after her memory had been restored, the witness revealed that she was with the defendant and the other two men accused of the murders on the night of the slaying. Although she did not see the actual slayings, she provided details of a meeting and ensuing fight between the defendants and the male victim, and the defendants' subsequent abduction of the female victim. *Id.*

[103] *Id.* One commentator has stated that the best method of bringing the fact of hypnosis before the trier of fact is to permit the cross-examiner to raise the issue for the purpose of impeaching the witness. Dilloff, *supra* note 5, at 21-22.

[104] 492 P.2d at 315.

[105] *Id.* The tape was played to the jury at the request of defense counsel. *Id.*

Similarly, in *State v. McQueen,*[107] the court allowed testimony from a prostitute who had witnessed the murders of her co-workers five years earlier.[108] Until a few weeks prior to trial, she was unable to remember the killings.[109] After undergoing hypnosis at her own request, the witness recalled details of the murders and testified from her refreshed memory.[110] The defense was given a tape of the procedure shortly before she testified.[111] The court found her hypnosis affected the credibility but not the admissibility of her testimony.[112]

Not all states considering the issue of the hypnotically-refreshed memory have admitted such testimony. In a recent Arizona case,[113] the court found the lower court had erred in permitting hypnotically-induced testimony.[114] The court granted that hypnosis was useful for investigative purposes[115] but concluded that the state of the science was not sufficiently advanced to allow the admission of testimony developed using hypnosis.[116]

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[106] *Id.*

[107] 295 N.C. 96, 244 S.E.2d 414 (1978).

[108] *Id.* at 122, 244 S.E.2d at 429. The witness testified that she saw the defendant kill both the operator and an employee at the house of prostitution where the witness was employed. *Id.* at 100, 244 S.E.2d at 417. The witness, who had formerly worked in a house of prostitution operated by the defendant, then left the scene of the crime with him. After traveling across the country together, they separated upon being advised of the circulation of a police flier bearing their pictures. The witness subsequently surrendered to authorities. *Id.* at 99-101, 244 S.E.2d at 416-17.

[109] The witness stated that she blamed herself for the murders, and thus attempted to block the incident from her mind. As to her memory of the crime prior to the hypnotic session, she stated, "[S]ometimes I knew I saw him kill them and sometimes I really knew I hadn't seen him; I just know, I couldn't remember." *Id.* at 101, 244 S.E.2d at 417.

[110] *Id.*, 244 S.E.2d at 417. "When I was under hypnosis I was able to actually go back to that day five years ago and just relive the whole morning and see the whole day like it was right now, everything was fresh." *Id.*, 244 S.E.2d at 417.

[111] The tape was presented to the defense counsel the day before the witness testified. The tape was not offered into evidence. The defense neither cross-examined the witness regarding the hypnosis procedure nor called the hypnotist as a witness at the trial. *Id.*, 244 S.E.2d at 417-18.

[112] *Id.* at 119, 244 S.E.2d at 427. The court noted that the jury had been fully advised that the witness had been hypnotized. The court then compared the method of refreshing a witness' memory by hypnosis with other methods of refreshing recollection, such as the reading of documents. The court found no discernible difference in the methods and held that the credibility of the witness' refreshed testimony is a matter for the jury. *Id.*, 244 S.E.2d at 427.

[113] State v. LaMountain, 125 Ariz. 547, 611 P.2d 551 (1980).

[114] 611 P.2d at 555. The defendant was convicted of first degree rape, lewd and lascivious acts, and attempted lewd and lascivious acts. *Id.* at 552. At trial, a previous alleged victim of the defendant at the same laundromat was able to identify the defendant only after hypnosis. Also, an eyewitness to the same incident was able to identify the

Similarly, the Minnesota Supreme Court recently refused to allow hypnotically-induced testimony,[117] fearing that the susceptibility of the subject and possibility of even inadvertent suggestion would produce results that would make credibility impossible to evaluate.[118]

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defendant only after hypnosis. *Id.* at 553.

[115] *Id.* at 555.

[116] *Id.* The Arizona court recently affirmed its position with regard to hypno-induced testimony in State v. Mena, 128 Ariz. 226, 624 P.2d 1274 (1981). In that case the court reasoned that since hypnosis is a scientific procedure, it must meet the standard for admission of scientific evidence, which is general acceptance of the method or principle in the particular field. 624 P.2d at 1279. Finding that hypnosis had not become generally accepted as a means of improving memory effectiveness, the court held that the testimony of a witness who has been hypnotized should be excluded. *Id.*

A similar case is Rodriguez v. State, 327 So. 2d 903 (Fla. Dist. Ct. App. 1976). There the defense sought to introduce the testimony of the hypnotist regarding statements made by the defendant while he was under hypnosis. *Id.* at 904. The court found that hypnotic evidence did not meet the criterion of reasonable demonstrability necessary for the admission of scientific evidence, and, thus, exclusion was proper. *Id.*

The standard for the admissibility of scientific evidence was established in Frye v. United States, 293 F. 1013 (D.C. Cir. 1923). In excluding expert testimony concerning the use of a systolic blood test, the court stated that scientific evidence is only admissible when it has gained general acceptance in the particular field. *Id.* at 1014.

It seems reasonable to apply this standard in a case, such as *Rodriguez,* where statements made during hypnosis are the subject of the testimony. The standard does not appear to be applicable where the witness is himself testifying from a refreshed memory. In the latter instance, it is not the result of a scientific test that is being introduced. Rather the witness' present memory—now unimpeded by psychological barriers, removed through hypnosis—is the source of the testimony.

For a general discussion of the applicability of the *Frye* test to hypno-induced testimony, see Note, *Safeguards Against Suggestiveness: A Means For Admissibility of Hypno-Induced Testimony,* 38 WASH. & LEE L. REV. 197 (1981).

[117] State v. Mack, 292 N.W.2d 764, 772 (Minn. 1980). The victim underwent hypnosis to restore her memory of an alleged assault. The victim could not remember the event because she was intoxicated at the time. *Id.* at 765.

[118] *Id.* at 767. The court tested the admissibility of hypno-induced testimony by the scientific admissibility standard set down in Frye v. United States, 293 F. 1013, 1014 (D.C. Cir. 1923). 292 N.W.2d at 771. Relying on expert testimony that, due to several factors, it was impossible to tell if the memory retrieved by hypnosis was accurate, the court held that the *Frye* test had not been met. *Id.* at 768-71. For a discussion of the accuracy of hypno-induced testimony, see notes 54 through 66 and accompanying text *supra.* For a discussion of the applicability of the *Frye* test to hypno-induced testimony, see note 116 *supra.*

In a case decided in 1981,[119] the New Jersey Supreme Court appeared sympathetic to the reservations expressed by the Arizona and Minnesota courts.[120] It held, however, that a witness in a criminal trial may testify from a refreshed memory if certain safeguards are met.[121] The court first noted that hypnotically-refreshed testimony must meet the standard for scientific evidence, since the credibility of the results depends upon the scientific reliability of the procedure.[122] It mentioned the dangers of inaccuracy accompanying hypnosis[123] but saw no reason to enforce a blanket exclusion "of evidence that is as trustworthy as other eyewitness testimony."[124] The New Jersey court was specific in its requirements for the admission of hypnotically-refreshed testimony in a criminal trial. The standard of admissibility is whether "the trial court finds that the use of hypnosis in the particular case was reasonably likely to result in recall comparable in accuracy to normal human memory."[125]

The trial court must further consider whether or not the kind of memory loss involved is one for which the use of hypnosis is appropriate.[126] If it finds hypnosis is appropriate, the court must then evaluate whether the procedures followed were reasonably reliable.[127] To provide an adequate record for evaluating the reliability of the hypnotic procedure and to ensure the minimum level of reliability, the court adopted a set of requirements that must be met before hypnotic evidence will be admitted:

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[119] State v. Hurd, 86 N.J. 525, 432 A.2d 86 (1981).

[120] *See* 432 A.2d at 91 (discussing difficulties with hypnotic evidence).

[121] *Id.* at 92.

[122] *Id.* at 91.

[123] *Id.* at 92-94. The court noted several features of hypnosis that made it an unreliable method of obtaining accurate recall. The court first noted that during hypnosis the subject was extremely vulnerable to suggestion and that the subject's tendency was to shape the recall in response to the intentional or inadvertent cues from the hypnotist. The second problem mentioned was the loss of critical judgment by the subject, whereby the subject becomes more willing to speculate and respond to questions with confidence than he or she would have under normal circumstances. Finally, the court found the most distressing problem contributing to the unreliability of hypno-induced memory was the tendency of the subject to confound memories evoked under hypnosis with prior recall. *Id.*

[124] *Id.* at 94. The court noted that several psychological studies on the reliability of eyewitness testimony revealed problems similar to those involved with hypnosis. *Id.* at 94-95. *See generally* Kubie, *Implications for Legal Procedure of the Fallibility of Human Memory,* 108 U. PA. L. REV. 59 (1959) (problems with eyewitness testimony).

[125] 432 A.2d at 95. The court based this standard on expert testimony that, in appropriate cases and when properly conducted, the use of hypnosis to refresh memory reveals information as reliable as that obtained through ordinary recall. *Id.*

[126] *Id.* The court noted that the subject's lack of memory was an important factor in evaluating the reliability of hypnosis in restoring recall. Relying on expert authority, the court stated that hypnosis is reasonably reliable in reviving normal recall where there is

> (1) A psychiatrist or psychologist experienced in the use of hypnosis must conduct the session. (2) The professional conducting the hypnotic session should be independent of and not regularly employed by the prosecutor, investigator or defense. (3) Any information given to the hypnotist by law enforcement personnel or the defense prior to the hypnotic session must be recorded, either in writing or another suitable form. (4) Before inducing hypnosis, the hypnotist should obtain from the subject a detailed description of the facts as the subject remembers them. (5) All contacts between the hypnotist and subject must be recorded. The use of videotape, the only effective record of visual cues, is strongly encouraged but not mandatory. (6) Only the hypnotist and the subject should be present during any phase of the hypnotic session, including the pre-hypnotic testing and the post-hypnotic interview.[128]

IV. CONCLUSION

Mississippi will soon be faced with the question of the admissibility of hypnotically-induced testimony. It may be faced with admissibility problems concerning other types of hypnotic

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a pathological reason for the witness' inability to remember. The court further added that the accuracy of recall diminished if hypnosis was used to refresh a witness' memory concerning details where there was no recollection at all, or if used to verify one of several conflicting accounts. *Id.* at 95-96 (citing Orne, *The Use and Misuse of Hypnosis in Court,* 27 INT'L J. CLINICAL AND EXPERIMENTAL HYPNOSIS 311, 324-25, 332 (1979)).

The court mentioned that another factor to be considered in determining the reliability of the hypno-induced memory was whether the witness had any discernible motivation for not remembering, or for recalling a particular version of events. The court noted that experts in the field had found that the possibility of creating self-serving fantasy in this situation was significant. *Id.* at 96 (citing Orne, *supra,* at 314-15).

[127] 432 A.2d at 96. The court listed several factors to consider in this regard, including the nature of the questioning, any cues or suggestions given, and the susceptibility of the subject to hypnosis. *Id.*

[128] *Id.* at 96-97. The court also found that the party seeking to introduce the hypnotically-refreshed testimony had the burden of establishing its admissibility by clear and convincing evidence. *Id.* at 197.

evidence as well. Any decision should be reached only after careful study of the direction taken by other jurisdictions and the available information concerning hypnosis.

It is clear that minimum safeguards must be established. Given these, however, Mississippi courts should not be reluctant to follow the majority of courts in admitting testimony from a witness with a hypnotically-refreshed memory. The following are suggested as general guidelines to adopt:

> (1) The entire procedure of hypnosis and the hypnotic interview should be tape recorded or videotaped, if possible;[129]
>
> (2) The hypnotist should be impartial and be able to qualify as an "expert" under the court's standards;[130]
>
> (3) The opposing party or parties should have full access, prior to trial, to the recording of the hypnotic interview;[131]
>
> (4) The opponent(s) must have free rein to cross-examine the hypnotically-induced witness and/or the hypnotist concerning the witness' memory and the particular procedure used to refresh it;[132]
>
> (5) Corroborating testimony or physical evidence should always be used to substantiate the hypnotically-enhanced statements made by witnesses or victims.[133]

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[129] Videotaping the hypnotic session combined with access of opposing counsel to the tape and his ability to cross-examine the hypnotist would eliminate many of the dangers that have been noted. *See* notes 54 through 66 and accompanying text *supra.* A videotape would reveal parties present, any physical or nonverbal cueing that might occur, as well as the questions asked. Any elements that create unreliability or an increased likelihood of inaccuracy could then be brought to the jury's attention through cross-examination of the hypnotist.

[130] Both medical professionals and investigative hypnotists could meet this standard. This insistence of some courts that the hypnotist be a medical doctor or psychologist is misguided. The major concerns are that the hypnotic technique be reliable and that the questions asked not be suggestive. Skill in these matters relates to one's expertise in hypnosis and not to medical training. *See* note 94 *supra.*

[131] *See* United States v. Miller, 411 F.2d 825, 830-31 (2d Cir. 1969) (duty to disclose pretrial hypnosis).

[132] *Id.*

[133] *See* People v. Lewis, 103 Misc. 2d 881, 427 N.Y.S.2d 177, 179 (N.Y. County Ct. 1980) (evidence tending to corroborate or to challenge statements made during trance should be considered).

As other types of hypnotic evidence become issues, other guidelines or restrictions might be added. In doing so, the major consideration should be to minimize the possibilities of inaccuracy while allowing the trier of fact to benefit from the investigative value of a remarkable technique.

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COMMENTS

PARTIES ENTITLED TO INVOKE THE EXCLUSIONARY RULE: FOURTH AMENDMENT STANDING IN TRANSITION

The exclusionary rule is a judicially-created principle[1] which serves to ensure that proper deference is accorded to the fourth amendment's guarantee of freedom from unreasonable searches and seizures. By requiring illegally obtained evidence to be excluded from trial, the rule is said to act as a deterrent to constitutional violations by law enforcement officials and to promote the integrity of the judicial system.[2] However, the widespread application of the exclusionary rule is limited by the fact that a party cannot claim a protective right under the Constitution unless he is a member of the class for whose benefit the constitutional protection was made.[3] In essence, this means that only a defendant who has had his own constitutional rights violated is entitled to invoke the exclusionary rule to bar the admission of evidence.[4] This requirement traditionally has been called a rule of "standing" to raise a constitutional claim.[5] In the search and seizure area, the question of who is a victim of illegal police conduct and who thus has standing to challenge the illegal action is more complex than in other areas involving constitutional guarantees.[6] The United States Supreme

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[1] The question of the inadmissibility of illegally seized evidence was first raised in Boyd v. United States, 116 U.S. 616, 630 (1886). *See* Nelson, *Search and Seizure: Boyd v. United States,* 9 A.B.A.J. 773, 775 (1923) (discussion of Justice Bradley's suggestion that the fourth amendment should exclude certain evidence). Slightly over a quarter of a century later, the Supreme Court, in Weeks v. United States, 232 U.S. 383 (1914), established the exclusionary rule to require evidence obtained in violation of an individual's fourth amendment rights to be suppressed. The rule was applicable, however, only to federal criminal cases. *Id.* at 392. In Wolf v. Colorado, 388 U.S. 25, 28-33 (1949), the Supreme Court held that the fourteenth amendment due process clause did not require that state courts adopt the *Weeks* exclusionary rule. However, twelve years later, in Mapp v. Ohio, 367 U.S. 643 (1961), the Court overruled *Wolf* and imposed the exclusionary rule on the states. The Court thus closed "the only courtroom door remaining open to evidence secured by official lawlessness." *Id.* at 654-55.

[2] The Court in Elkins v. United States, 364 U.S. 206 (1960) emphasized that while the preservation of judicial integrity was an important consideration, *id.* at 222-23, the primary purpose of the exlcusionary rule "is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Id.* at 217. In subsequent decisions, members of the Court have disagreed sharply on which considerations accurately reflect the purpose of the rule. *Compare* United States v. Payner, 447 U.S. 727, 735 n.8 (1980) (exclusionary rule serves dual purposes of deterrence and protection of judicial integrity) *and* United States v. Calandra, 414 U.S. 338, 357-60 (1974) (Brennan, J., dissenting) (primary purpose of rule is to preserve judicial integrity, not deter police misconduct) *with* Stone v. Powell, 428 U.S. 465, 484-85 (1976) (concern for judicial integrity is of only limited value as justification for exclusionary rule) *and* United States v. Calandra, 414 U.S. 338, 347-48 (1974) (rule operates to deter future misconduct and not to redress injury to victim of unconstitutional search).

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[3] *E.g.,* Tileston v. Ullman, 318 U.S. 44, 46 (1943) (adverse interest which contesting party must show cannot be based on violation of rights of third party); Goldstein v. United States, 316 U.S. 114, 121 (1942) (general trend in fourth amendment area is to deny standing to those not victims of the unconstitutional action); New York *ex rel.* Hatch v. Reardon, 204 U.S. 152, 160 (1907) (party alleging the unconstitutionality of state tax law must belong to the class for whose sake the constitutional protection is given). The requirement of standing operates to augment the established policy of deciding constitutional questions only when absolutely necessary to the disposition of the case or controversy. Edwards, *Standing to Suppress Unreasonably Seized Evidence,* 47 Nw. U.L. REV. 471, 472 (1952).

[4] Rule 41(e) of the Federal Rules of Criminal Procedure limits the ability to make a motion to suppress to a "person aggrieved by an unlawful search and seizure." The Court in Rakas v. Illinois, 439 U.S. 128 (1978), determined that this standard was no different from the constitutional standard of fourth amendment standing. *Id.* at 132 n.2. Jones v. United States, 362 U.S. 257 (1960), made it clear that in order to be "aggrieved," a person must have himself been a victim of a search and seizure, as opposed to one who claimed prejudice only through the use of evidence gathered through a search or seizure involving a third party. *Id.* at 261.

[5] The Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), discarded "standing" as a theoretically separate analytical concept and determined that traditional standing requirements should henceforth be defined by reference to substantive fourth amendment law. *Id.* at 138-40. The term "standing" nonetheless continues to appear in some Court opinions. *E.g.,* United States v. Payner, 447 U.S. 727, 731-32 (1980); *id.* at 738, 742-43, 748 (Marshall, J., dissenting). Although this Comment continues to use the word "standing" in order to simplify the discussion of fourth amendment issues, proper terminology now requires a defendant to show that he has a legitimate expectation of privacy in the invaded area before being allowed to make a motion to suppress. *See* text accompanying notes 44 through 46 *infra.*

[6] For example, the general rule against vicarious assertion of constitutional rights is easily applied in the fifth amendment context of an illegally obtained confession; only the person who made the improperly obtained confession can seek to suppress it. If the confession implicates another party, it still may be introduced in evidence against him since no rights of the second party have been violated by virtue of the illegal treatment accorded the confessor. *Cf.* Wong Sun v. United States, 371 U.S. 471, 491-92 (1963) (defendant implicated by illegal seizure from and illegally obtained statement of others lacks standing to challenge the illegal action).

Court, in *Rakas v. Illinois*[7] and succeeding decisions,[8] has significantly limited the class of persons who may properly be regarded as victims of illegal action, thus dramatically altering the fourth amendment law of standing. This Comment will briefly examine the pre-*Rakas* law of standing and will then attempt to analyze the effect of the recent Supreme Court decisions on the rights accorded defendants under the fourth amendment.

I. THE REQUIREMENT OF STANDING IN SEARCH AND SEIZURE CASES

A. *Why a Standing Requirement?*

As noted, the Supreme Court traditionally has required that a party have a personal interest in a fourth amendment claim before that party can properly assert it. The personal interest must be derived from a violation of his own constitutional rights. However, the Court has determined that third party standing—allowing a party to contest the violation of another's constitutional rights—is not prohibited by the Constitution.[9] Consequently, numerous authorities have urged that vicarious assertion of constitutional rights should be allowed in the context of the exclusionary rule in order to effectively deter fourth amendment violations.[10] The most cogent arguments have usually advocated the adoption of a "target" theory whereby any criminal defendant at whom a search was directed would have standing to contest the legality of the search.[11] The Supreme Court, in balancing the potential deterrent value of such a rule against the public interest in admitting all relevant evidence at trial,[12] has rejected any such attempts at permitting vicarious or derivative standing.[13] The Court's finding that vicarious standing is not prohibited by the Constitution leaves open, however, the possibility that state courts could grant such standing. Despite this possibility, only California[14] has adopted a standing provision more lenient than that formulated by the Supreme Court. The California Supreme Court has determined that effective deterrence of illegal police conduct can be accomplished only by extending the exclusionary rule to individuals who have no constitutional right to claim the benefit of the rule.[15] Similarly, the Model Code of Pre-Arraignment Procedure permits third party standing by allowing a motion to suppress to be made by a defendant, a member of his family, a co-conspirator, a business partner, or a co-resident.[16] Despite the commendable objective of such vicarious standing schemes,[17] policy considerations inherent in the exclusion of relevant evidence from the trier of fact in criminal cases have caused the vast majority of states to follow the more restrictive position of the United States Supreme Court.[18] While the full effect of the Supreme Court's rejection of the target theory in *Rakas* is uncertain, the probability that state courts would now adopt such a theory would seem to be remote.

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[7] 439 U.S. 128 (1978); *see* notes 38 through 59 and accompanying text *infra.*

[8] Rawlings v. Kentucky, 448 U.S. 98 (1980); United States v. Salvucci, 448 U.S. 83 (1980); United States v. Payner, 447 U.S. 727 (1980).

[9] Alderman v. United States, 394 U.S. 165, 174-76 (1969); Flast v. Cohen, 392 U.S. 83, 98, 99 n.20 (1968). In general, a state is free as a matter of its own law to impose greater restrictions on police activity than does the United States Supreme Court in its application of federal constitutional standards. Sibron v. New York, 392 U.S. 40, 60-61 (1968); Cooper v. California, 386 U.S. 58, 62 (1967). The New Jersey Supreme Court recently invoked this principle in refusing to adopt the United States Supreme Court's restrictive approach to fourth amendment standing. In State v. Alston, 87 N.J. 531, 436 A.2d 81 (1981), the New Jersey court decided to retain the standing rules applicable in that state before *Rakas v. Illinois,* thereby continuing to allow a party who has a prorietary, possessory, or participatory interest in either the place searched *or* the property seized to bring a motion to suppress. 436 A.2d at 89. The court also retained the "automatic standing" rule which the United States Supreme Court abandoned in United States v. Salvucci, 448 U.S 83, 95 (1980). 436 A.2d at 89-90. No support was offered, however, for the "target" theory or the "legitimately on the premises" test. *Id.* at 90 n.12.

[10] *See, e.g.,* Brown, *Standing To Object To An Unlawful Search and Seizure,* 1965 WASH. U.L.Q. 488, 517 (1965) (proposing adoption of target theory as effective means of deterring unlawful police conduct); Comment, *Standing to Contest Illegal Searches and Seizures,* 46 MISS. L.J. 147, 168 (1975) (same).

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[11] The target theory was squarely presented to the Supreme Court in Rakas v. Illinois, 439 U.S. 128 (1978), and was unequivocally rejected. The petitioners in *Rakas* pointed to language in Bumper v. North Carolina, 391 U.S. 543, 548 n.11 (1968), Jones v. United States, 362 U.S. 257, 261 (1960) and United States v. Jeffers, 342 U.S. 48, 54 (1951), as support for the target theory. 439 U.S. at 132-38.

Cases which have used a target analysis in deciding questions of standing include: United States v. Cobb, 432 F.2d 716, 719-20 (4th Cir. 1970); United States v. Rosenberg, 416 F.2d 680, 682 (7th Cir. 1969); State v. Hink, 6 Wash. App. 374, 492 P.2d 1053, 1055 (1972).

[12] *See* Rakas v. Illinois, 439 U.S. at 134 n.3, 137 (1978) (exclusion of evidence means the search for the truth at a trial is deflected); Alderman v. United States, 394 U.S. 165, 174-75 (1969) (benefit of added deterrence of illegal action is outweighed by excessive encroachment upon public interest in successful criminal prosecution).

[13] *See* note 11 *supra*. As an additional reason for the rejection of the target theory the Court noted the "substantial administrative difficulties" which the rule would entail. 439 U.S. at 136-37 (quoting Alderman v. United States, 394 U.S. 165, 188 n.1 (Harlan, J., concurring and dissenting)).

[14] *See* People v. Martin, 45 Cal. 2d 755, 290 P.2d 855, 857 (1955) (evidence obtained from illegal search and seizure cannot be introduced in any trial, regardless of standing of defendant). This decision permits a defendant to require exclusion of evidence obtained by violating the fourth amendment rights of another person.

[15] The court permitted vicarious standing on the ground that "the government must not be allowed to profit by its own wrong and thus [be] encouraged in the lawless enforcement of the law." 290 P.2d at 857.

[16] AMERICAN LAW INSTITUTE MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 290.1(5) (1974).

[17] *See* note 15 and accompanying test *supra*.

State legislative action is another possible means of permitting third party standing, albeit an equally unlikely one.[19] Thus, it is obvious that the boundaries drawn by the United States Supreme Court in the area of fourth amendment standing serve to set the standard for almost all lower courts, despite the availability of less restrictive alternatives. A look at the Court's decisions in the years before 1978 will serve to emphasize the dramatic change in the law of standing since that time.

B. The Concept of Standing Before Rakas

In *Jones v. United States*,[20] the Supreme Court clarified earlier standing decisions[21] by rejecting the view that an individual subjected to an unlawful search only had standing if he had some special property right in the premises. The Court in *Jones* held that one need only show that he was legitimately on the premises searched in order to obtain an interest sufficient to confer standing.[22] *Jones* also stated that one charged with a crime requiring proof of his possession of seized property had automatic standing to contest the legality of the seizure.[23] The automatic standing rule prevented a defendant from facing up to the "dilemma" of having to assert possession of an item in order to achieve standing, only to have this admission used against him by the prosecution in establishing its case.[24] Eight years later, in 1968, the Court, in *Simmons v. United States,*[25] set forth an additional rule which directly addressed the "dilemma" outlined in *Jones* and significantly undermined the need for automatic standing. The Court ruled that testimony by a defendant at a suppression hearing could not be admitted against him at trial on the issue of guilt.[26] Thus, a defendant may allege possession of an item at the suppression hearing, and, if the motion to suppress is denied, deny possession at trial without the possibility of his earlier testimony being used against him in the prosecution's case-in-chief.[27]

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[18] *See generally* Annot., 78 A.L.R.2d 246, 251-72 (1961) (surveying state court decisions). *But cf.* State v. Alston, 87 N.J. 531, 436 A.2d 81, 89-90 (1981) (refusal to adopt privacy analysis).

[19] *But see* State v. Culotta, 343 So. 2d 977, 981-83 (La. 1976), where the Louisiana Supreme Court broadly interpreted the newly revised article 1, section 5 of the Louisiana Constitution of 1974, as permitting a defendant to challenge searches against third parties when the defendant would be adversely affected by the fruits of the search. *See generally The Work of the Louisiana Appellate Courts for the 1976-1977 Term*, 38 La. L. Rev. 313, 516-20 (discussion of *Culotta* decision). *See also* note 97 *infra* (discussing potential impact of legislative and judicial action establishing privacy expectations).

[20] 362 U.S. 257 (1960). For a more extensive discussion of the standing decisions before *Rakas* and their impact on Mississippi case law, see Comment, *supra* note 10, at 150-66.

[21] *E.g.*, United States v. Jeffers, 342 U.S. 48, 54 (1951) (ownership or right to possession of premises is sufficient to confer standing).

[22] 362 U.S. at 267.

[23] *Id.* at 264.

In *Katz v. United States,*[28] the Supreme Court redefined the nature of the interests protected by the fourth amendment in terms of privacy. The issue in *Katz* was whether the defendant, who had been subjected to warrantless electronic eavesdropping while in a public telephone booth, could properly be regarded as the victim of a search.[29] The Court held that fourth amendment protection extends beyond property lines to areas in which one has a reasonable expectation of freedom from governmental intrusion. Since the bugging of Katz' booth "violated the privacy upon which he justifiably relied," the Court found the deprivation of a fourth amendment interest, notwithstanding Katz' lack of a property interest in the booth.[30]

The privacy expectation doctrine of *Katz* was extended to the standing area in *Mancusi v. DeForte.*[31] There, DeForte, a union official who shared an office with other employees, attempted to suppress papers seized during a search of the office.[32] The Court determined that DeForte's expectation of privacy was similar to that of the defendant in *Jones* and was therefore sufficient to accord him standing, despite the fact that he neither owned the seized papers nor had title to the searched premises.[33]

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[24] *Id.; see* text accompanying notes 25 and 26 *infra. Jones* was followed by the Mississippi Supreme Court in Canning v. State, 226 So. 2d 747, 751-52 (Miss. 1969).

[25] 390 U.S. 377 (1968).

[26] *Id.* at 394; *see* text accompanying note 128 *infra.*

[27] *But see* notes 128 through 141 and accompanying text *infra* (discussing the potential use of suppression hearing testimony for purposes of impeachment).

[28] 389 U.S. 347 (1967).

[29] *Id.* at 348-49.

[30] *Id.* at 350-53.

[31] 392 U.S. 364 (1968).

[32] *Id.* at 365.

[33] *Id.* at 367-70. Justice Black, dissenting, contended that the logical extension of the Court's holding would do away with standing entirely. *Id.* at 376.

The 1969 decision in *Alderman v. United States*[34] constituted the Supreme Court's most extensive pre-*Rakas* discussion of the general standing requirement for the exclusionary rule and dealt in particular with the question of third party standing. *Alderman* involved the admissibility against one defendant of evidence obtained from an illegal wiretap of another defendant's conversation. The Court, in rejecting vicarious standing for co-defendants or co-conspirators, determined that only a victim of the search has standing and only one whose privacy has been invaded can properly call himself a "victim" of the search.[35] Employing a balancing test, the Court concluded that the public interest in a criminal prosecution based on all the relevant evidence outweighed any additional benefit which might result from the extension of the exclusionary rule to those unable to show a violation of personal privacy.[36] In reaching its decision, the Court made it clear that the fourth amendment does not require the adoption of all procedures which would deter illegal searches, but rather the deterrent value of the exclusionary rule must be measured against the practical considerations involved in excluding relevant evidence from criminal trials.[37]

II. *Rakas* AND THE LEGITIMATE EXPECTATION OF PRIVACY REQUIREMENT

A. *The* Rakas *Holding*

The decision in *Rakas v. Illinois*[38] reflected the Court's dissatisfaction with both the theoretical foundation and practical implications of the existing law of standing. In this case, police stopped a car in which the defendants were passengers, suspecting that the car might have been used in a recent robbery. The police searched the interior of the car and found a sawed-off rifle under the front passenger seat and a box of rifle shells in the locked glove compartment.[39] Neither of the defendants claimed ownership of either the automobile, the rifle, or the shells.[40] In affirming the lower court decision that the defendants lacked standing to object to the search and seizure, the Supreme Court engaged in an extensive discussion of the parties properly entitled to invoke the exclusionary rule.

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[34] 394 U.S. 165 (1969). For a discussion of the electronic surveillance questions presented in *Alderman,* see notes 118 through 125 and accompanying text *infra.*

[35] 394 U.S. at 174.

[36] *Id.* at 174-75.

[37] *Id.* The Court, in Rakas v. Illinois, 439 U.S. 128 (1978), stated that *Alderman* clearly rejected third party standing as a constitutional requirement for all fourth amendment cases. 439 U.S. at 138 n.6.

[38] 439 U.S. 128 (1978).

[39] *Id.* at 130.

[40] *Id.* at 130 & n.1.

The Court first rejected the target theory, urged by the defendants, by employing the balancing approach outlined in *Alderman* and by identifying the administrative impracticability of such a rule.[41] The Court denied that the phrase "one against whom the search was directed" contained in the *Jones* definition of "person aggrieved"[42] was a tacit endorsement of the target theory.[43] Secondly, the *Rakas* majority determined that the concept of standing served no useful purpose in the fourth amendment context in that standing was "invariably intertwined" with substantive fourth amendment law and a determination of rights under the fourth amendment obviated the necessity of resort to standing concepts.[44] The Court thus made the relevant inquiry whether the fourth amendment rights of a criminal defendant were violated by a search and seizure.[45] Relying on *Katz,* the Court stated that since the fourth amendment protects areas or items in which individuals have established a reasonable expectation of privacy, the question then becomes whether the defendants have such an interest in the area searched.[46] While admitting that this new approach in no way simplified the disposition of fourth amendment cases,[47] the majority found the "sounder logical footing" which the new analysis provided to be a sufficiently compelling reason for the change.[48]

Finally, the majority found the "legitimately on [the] premises" test set forth in *Jones* to be too broad a standard by which to measure the ability to assert fourth amendment rights.[49] *Jones* was reduced to the proposition that one may have an interest in a place other than his home sufficient to protect him from unreasonable governmental intrusion into that place.[50] Thus, one's legal right to be present at a certain location becomes merely one of the factors to be considered in determining whether the person had a legitimate expectation of privacy in the premises searched.[51]

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[41] *Id.* at 132-38; *see* notes 10 through 13 and accompanying text *supra.*

[42] *See* note 4 *supra.*

[43] 439 U.S. at 134-35.

[44] *Id.* at 138-40; *see* note 5 *supra.*

[45] 439 U.S. at 140.

[46] *Id.* at 143-44.

[47] *Id.* at 140.

[48] *Id.*

[49] *Id.* at 142. The Court noted that the lower courts had applied this language from *Jones* literally, resulting in some decisions contrary to the spirit of *Jones. Id.* at 142 n.10; *see, e.g.,* Garza-Fuentes v. United States, 400 F.2d 219, 221 (5th Cir. 1968) (drug dealers making purchase in room rented by federal agents held to have standing), *cert. denied,* 394 U.S. 963 (1969).

[50] *Id.* at 142-43. In United States v. Hunt, 505 F.2d 932, 938 (5th Cir. 1974), *cert.*

Concluding its discussion of standing principles in general, the Court turned to the facts in the instant case. Of prime importance was the fact that neither defendant claimed a property or possessory interest in the automobile or the items seized.[52] The fact that both defendants were legitimately on the premises at the time of the search was held not to be determinative.[53] The Court concluded that neither defendant enjoyed a legitimate expectation of privacy in the searched car, and, thus, neither party had the interest necessary to contest the legality of the search and seizure.[54]

The four dissenters in *Rakas,* while agreeing with the majority's rejection of the target theory,[55] objected strongly to the majority's repudiation of the "legitimately on the premises" test of *Jones.*[56] The dissenters claimed that the holding effectively substituted an uncertain and hard-to-apply standard in place of a relatively easily-applied rule.[57] Additionally, the dissent claimed that the practical result of the majority's decision was the elevation of property-based considerations to the forefront once again, despite claims to the contrary.[58] Finally, the dissenters stressed the decision's impact in undercutting the deterrent value of the exclusionary rule by virtually inviting policemen to violate the rights of a group, knowing that probably few in the group can establish the requisite privacy interest.[59]

B. *Further Limitation of the Standing Doctrine:* Salvucci *and* Rawlings

The Supreme Court continued its erosion of the class of persons

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denied, 421 U.S. 975 (1975), the Fifth Circuit described *Jones* in language almost identical to that used by the *Rakas* majority.

[51] 439 U.S. at 148. Justice White, dissenting in *Rakas,* contended that by rejecting the legitimately on the premises test in favor of the legitimate expectation of privacy standard, the court was rejecting a "bright line" rule in favor of one which was much more difficult to apply and would result in considerable confusion among law enforcement personnel. *Id.* at 168.

[52] 439 U.S. at 130.

[53] *Id.* at 148; *see* text accompanying note 51 *supra.*

[54] 439 U.S. at 148-50.

[55] *Id.* at 156 n.1 (White, J., dissenting).

[56] *Id.* at 158 (White, J., dissenting).

[57] *Id.* at 168 (White, J., dissenting); *see* note 51 *supra.*

[58] *Id.* at 156-57 (White, J., dissenting); *see* note 104 *infra.*

[59] *Id.* at 168-69 (White, J., dissenting).

entitled to assert the exclusionary rule in two 1980 decisions, *United States v. Salvucci*[60] and *Rawlings v. Kentucky*.[61] In *Salvucci*, the defendants, charged with unlawful possession of stolen mail, relied on *Jones* in claiming that they were entitled to "automatic standing." The Supreme Court determined, however, that the two factors supporting the rule in *Jones* were no longer viable. The Court first found that the risk that the defendant might be compelled to admit possession at the suppression hearing, and thereby incriminate himself, was eliminated by the ruling in *Simmons* that suppression hearing testimony was inadmissible at trial.[62] The Court then addressed the second prong of *Jones*, the "vice of prosecutorial self-contradiction," whereby the Government would contend that the defendant possessed the seized goods for purposes of criminal liability while simultaneously denying that he had possession for the purposes of claiming the protection of the fourth amendment.[63] The Court noted that, after *Rakas*, the question was not merely whether the defendant had a possessory interest in the items seized but also whether he had an expectation of privacy in the area searched that had been violated.[64] Since the Government could now consistently argue that a defendant lacked possession sufficient to confer standing yet had possession sufficient to be convicted, the Court ruled that this assumption underlying the automatic standing rule must also be discarded.[65] Accordingly, the Court overruled the automatic standing doctrine.[66] The Court dismissed a final argument that the *Jones* rule maximized deterrence of illegal police conduct and thus should be retained by employing the balancing approach to the use of the exclusionary rule as set forth in *Alderman*.[67]

In *Rawlings*, the Court made a direct application of the *Salvucci* reasoning that possession of seized goods and a legitimate expectation of privacy in the area searched do not necessarily correspond. The defendant in *Rawlings* was charged with possession of drugs that had been discovered in the purse of an acquaintance.[68] The Court determined that the defendant had no legitimate expectation that the third party's purse would remain free from governmental intrusion and thus failed to show a personal privacy interest that had been invaded.[69] The Court so held despite the fact that the defendant owned the drugs. Ownership of property will thus not necessarily confer the right to challenge the search and seizure, but rather serves merely as a factor to be considered in determining a party's expectation of privacy in the relevant area.[70]

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[60] 448 U.S. 83 (1980).

[61] 448 U.S. 98 (1980).

[62] 448 U.S. at 89-90; *see* text accompanying notes 26 and 27 *supra*.

[63] *See* Jones v. United States, 362 U.S. 257, 263-64 (1960) ("prosecution . . . subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation").

[64] 448 U.S. at 91.

[65] *Id.* at 90-91; *see* text accompanying note 70 *infra*.

[66] 448 U.S. at 85, 95.

[67] *Id.* at 94.

[68] Rawlings was a visitor to a house belonging to a third party. The police arrived with a warrant to arrest the owner of the house on drug charges. While inside the house,

C. *The Legitimate Expectation of Privacy Standard*

Proprietary and possessory interests in property searched or goods seized have traditionally determined one's ability to invoke the protection of the fourth amendment to contest illegal government action.[71] However, in *Katz v. United States,* the Supreme Court determined that the amendment "protects people, not places,"[72] and the Court therefore developed the reasonable expectation of privacy doctrine to determine when an invasion of a fourth amendment interest occurs.[73] The Court's decision in *Katz* to eschew reliance on property concepts was generally well received by commentators, many of whom saw the decision as a broadening of fourth amendment protections.[74] In sharp

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the police conducted a search of Rawlings and of several other visitors, including Cox, an acquaintance of Rawlings. In Cox's handbag they found a large quantity of LSD and other drugs, ownership of which was immediately claimed by Rawlings. Rawlings v. Kentucky, 448 U.S. at 100-01.

[69] *Id.* at 104-05. The Court noted that Rawlings had known Cox only a few days, had put the drugs in her purse only a few minutes before the police arrived, and did not have prior access to her purse. *Id.* at 105; *see* note 98 *infra.*

[70] 448 U.S. at 105.

[71] Brown v. United States, 411 U.S. 223, 229 (1973); Jones v. United States, 362 U.S. 257, 263 (1960).

[72] Katz v. United States, 389 U.S. at 351.

[73] *Id.* at 351-52. The term "reasonable expectation of privacy" is not found in the majority opinion in *Katz,* but rather comes from Justice Harlan's concurring opinion, which has been accorded great weight. *See, e.g.,* Smith v. Maryland, 442 U.S. 736, 740 (1979) (applying Harlan's formulation). Harlan's frequently-quoted interpretation of the privacy requirement is as follows: "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' " 389 U.S. at 361 (Harlan, J., concurring).

[74] *See, e.g.,* Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 385 (1974) (privacy analysis enlarges traditional boundaries of fourth amendment protection); Note, *The Reasonable Expectation of Privacy—Katz v. U.S., A Postscriptum,* 9 IND. L. REV. 468, 473-74 (1976) (*Katz* adds new dimension to fourth amendment protection to compensate for technological advances); Note, *From Private Places to Per-*

contrast to these expectations, the Court's recent standing decisions use the expectation of privacy concept to narrow the class of defendants protected by the fourth amendment.[75] This result is largely due to the fact that the Court has employed the property concepts supposedly rejected in *Katz* to limit the application of the privacy test itself. *Rakas* and *Rawlings* both emphasized the lack of the defendants' proprietary and possessory interests in the area searched to support the conclusion that these defendants had no legitimate expectation of privacy that was invaded by the search.[76] This fact, coupled with the failure of the Court to detail adequately which non-possessory factors the defendants in each case lacked so as to establish a legitimate expectation of privacy in the area searched, lends credence to the charge of the *Rakas* dissenters that the Court has returned to a property-based view of the fourth amendment.[77]

Of particular importance in evaluating the privacy approach to standing is the determination in *Rawlings* and *Salvucci* that the defendant must have a legitimate expectation of privacy in the *area searched,* as distinguished from the item seized.[78] Prior to these cases it seemed clear that an interest in either the place searched or the property seized was sufficient to contest an unreasonable search and seizure.[79] Justice Rehnquist, writing for the majority in both cases, relied on *Rakas* in asserting that ownership of a seized item does not necessarily entitle one to contest the search and seizure.[80] Yet *Rakas*

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sonal Privacy: A Post-Katz Study of Fourth Amendment Protection, 43 N.Y.U.L. REV. 968, 977 (1968) (*Katz* expands number of litigants entitled to standing).

[75] The Court's restrictive interpretation of *Katz* actually began before the decision in *Rakas. See* Note, *A Reconsideration of the Katz Expectation of Privacy Test,* 76 MICH. L. REV. 154, 154 & n.5 (1977) (reevaluating *Katz* in light of later cases).

[76] *See* Rawlings v. Kentucky, 448 U.S. at 105 (bailment relationship confers insufficient right to exclude others from relevant area); Rakas v. Illinois, 439 U.S. at 148 (citing defendants' failure to assert a property or possessory interest in the searched automobile). The *Salvucci* Court did not analyze the expectation of privacy requirement in light of the respondents' reliance on automatic standing. 448 U.S. at 95.

[77] *See* Rakas v. Illinois, 439 U.S. at 156-57 (White, J., dissenting) (majority tying application of exclusionary rule to property law concepts).

[78] *See* Rawlings v. Kentucky, 448 U.S. at 105 (ownership of seized property is insufficient to confer standing); United States v. Salvucci, 448 U.S. at 91-93 (same).

[79] *See* Simmons v. United States, 390 U.S. 377, 389-90 (1968) (either interest has traditionally been sufficient to accord standing); Jones v. United States, 362 U.S. 257, 261, 264 (1960) ("The possession [of narcotics] on the basis of which petitioner is to be and was convicted suffices to give him standing under any fair and rational conception of the requirements of Rule 41(e)"). *Rakas* did little to dispel this idea. *See* note 81 *infra.*

[80] *See* Rawlings v. Kentucky, 448 U.S. at 105; United States v. Salvucci, 448 U.S. at 91-93. The *Salvucci* Court held that ownership of seized property was a factor to be

contains express language which tends to show that this reliance was misplaced.[81] Furthermore, as Justice Marshall's dissent in *Rawlings* pointed out, *Rakas* merely decided the question of whether the defendants had a right to fourth amendment protection based solely on the fact that they were legitimately on the premises. Since the defendants asserted no ownership or possessory interest in the premises searched or property seized,[82] the issue of property-based standing was not even before the *Rakas* Court. The problems with discounting one's ownership of a seized item are several. First, such an approach tends to overlook the fourth amendment's guarantee that people will be secure in their "papers" and "effects" as well as in their "houses."[83] Second, the almost exclusive emphasis on the privacy expectation in the area

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considered in determining one's right to object. *Id.* at 91. However, the decisions in both *Salvucci* and *Rawlings* indicate the minimal impact which a property interest in such an item has on the Court's privacy analysis.

A footnote to the *Salvucci* decision stated that legal possession of a seized good may sometimes be sufficient to entitle a party to seek the return of the item if the seizure, as opposed to the search, was illegal. 448 U.S. at 91 n.6. Such a possessory interest in the item seized would therefore give a defendant who is unable to establish a privacy expectation in the area searched standing to contest the legality of only the seizure, not the search preceding it. This standing would be limited to narrow grounds, for example, that the goods were not contraband, the product of criminal activity, or evidence of a crime. *See* United States v. Lisk, 522 F.2d 228, 230-31 (7th Cir. 1975) (listing grounds), *cert. denied,* 423 U.S. 1078 (1976). Justice Marshall, in a vigorous dissent in *Rawlings,* urged that the illegal seizure of items owned by an individual gives one the right to challenge not only the seizure, but also the search which preceded it. 448 U.S. at 117-18; *see* United States v. Jeffers, 342 U.S. 48, 52 (1951) ("The search and seizure are . . . incapable of being untied"). However, as the *Lisk* court intimated, it seems likely that no legitimate expectation of privacy will be found when a party relies solely on the ownership of contraband or property used in an illegal activity. W. RINGEL, SEARCHES AND SEIZURES, ARRESTS AND CONFESSIONS § 2.03(b)(1) (2d ed. 1980). *Compare* United States v. Archibold-Newball, 554 F.2d 665, 678 (5th Cir.) (mere fact of proprietary interests in drugs is insufficient to infer violation of privacy interest upon their seizure), *cert. denied,* 434 U.S. 1000 (1977) *with* United States v. Banks, 465 F.2d 1235, 1241 (5th Cir. 1972) (owner of printing press used to produce counterfeit money and seized in co-defendant's residence has standing to contest the search leading to the seizure).

[81] In discussing why the "legitimately on the premises" standard should no longer apply to grant standing to visitors in a home, the *Rakas* Court stated: "This is not to say that such visitors could not contest the lawfulness of the seizure of evidence or the search if their own property were seized during the search." 439 U.S. at 142 n.11. The Court later stated: "Judged by the foregoing analysis, petitioners' claims must fail. They asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized." *Id.* at 148. The obvious implication of such language is that ownership of seized property would be sufficient to entitle one to object.

[82] *Id.* at 129, 148.

[83] U.S. CONST. amend. IV.

searched ignores the admonition in *Katz* that the protections of the fourth amendment "go further, and often have nothing to do with privacy at all."[84] The *Katz* privacy expectation doctrine is thus best viewed as one which supplements, but not totally replaces, the traditional protections provided by the fourth amendment.[85] Finally, disregarding one's interest in a seized item precludes a defendant whose property is not under his immediate control from contesting the search and seizure of the property, no matter how reprehensible the action was that resulted in the seizure. This approach thus undercuts the deterrent function of the fourth amendment by removing any restraining influence on policemen who seize a defendant's property when it is either not on his person or otherwise outside of an area[86] in which he has an expectation of privacy.[87] A return to a more balanced analysis which

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[84] Katz v. United States, 389 U.S. at 350. In addition, the *Salvucci-Rawlings* privacy test directly conflicts with the finding in *Katz* that "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of a Fourth Amendment protection . . . [b]ut what he seeks to preserve as private, *even in an area accessible to the public,* may be constitutionally protected." *Id.* at 351-52 (emphasis added). If, as was recently stated, *Katz* is the "lodestar" which determines when an unreasonable search has taken place, Smith v. Maryland, 442 U.S. 736, 739 (1979), the present Court may be slightly off course.

[85] *See* Rawlings v. Kentucky, 448 U.S. at 118-19 (Marshall, J., dissenting) (*Katz* not intended to be an exclusive statement of interests protected under the fourth amendment); note 74 and accompanying text *supra.*

[86] The Court has not been completely clear in delineating exactly in what area the defendant must have a privacy interest to achieve an expectation of privacy in the "area searched." The *Salvucci* Court remanded the case to allow the defendants the opportunity to establish a privacy expectation "in the area of Zackular's [defendant's] mother's home where the goods were seized." 448 U.S. at 95. Likewise, Justice Marshall, dissenting in *Rawlings,* inferred that by "area searched" the majority meant the "premises" on which the search took place. 448 U.S. at 118. However, the *Rawlings* majority considered only the privacy expectations of the defendant in the *purse* in which the drugs were found, without referring to the house. *Id.* at 103-06. Further, the *Rakas* Court spoke of the defendants' failure to establish a legitimate expectation of privacy in specific areas within the searched car, 439 U.S. at 148-49, while also referring to the interest the defendant in *Jones v. United States* had in the entire apartment in which he was staying. *Id.* at 140-42. Thus, it seems that while the "area searched" may include the entire premises, it may also be limited to the immediate area from which the seized property was confiscated.

[87] The words of Justice White, dissenting in *Rakas,* are especially appropriate here. In arguing that the majority's decision greatly increased the possibility of bad-faith violations of the fourth amendment, Justice White commented:

> Of course, most police officers will decline the court's invitation and will continue to do their jobs as best they can in accord with the Fourth Amendment. But the very purpose of the Bill of Rights was to answer the justified fear that governmental agents cannot be left totally to their own devices, and

would equate a litigant's privacy expectation in property seized with that of the area searched would seem to be the path most consistent with the spirit of the fourth amendment.[88]

One of the problems with the recent standing decisions is the Court's failure to spell out the factor or factors that would have established that the defendants had a legitimate expectation of privacy in the areas searched. While stating that property law concepts no longer control,[89] the Court has proceeded to deny privacy interests to defendants largely on the basis of their failure to show a proprietary or possessory interest in the relevant area.[90] Lower courts are thus left with an uncertain guide in applying the Court's privacy standard.

The *Rakas* majority concentrated most of its analysis of the privacy standard in a footnote in which it stressed the importance of property rights:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, . . . and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.[91]

> the Bill of Rights is enforceable in the courts because human experience teaches that not all such officials will otherwise adhere to the stated precepts. Some policemen simply do act in bad faith, even if for understandable ends, and some deterrent is needed. In the rush to limit the applicability of the exclusionary rule somewhere, anywhere, the court ignores precedent, logic, and common sense to exclude the rule's operation from situations in which, paradoxically, it is justified and needed.

439 U.S. at 169.

[88] At least two commentators have proposed factors which the Court should consider in addition to the interest in the area searched when evaluating a privacy expectation claim. *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 52-64 (1974) (proposing three different privacy interests: the privacy of place, the privacy of presence, and the privacy of possession); 55 TUL. L. REV. 250, 265 (1980) (urging consideration of privacy interests in both the area searched and property seized as well as the circumstances by which the seized property was located in the searched area). *See also* 58 NEB. L. REV. 1123, 1136-37 (1979) (applying the Weinreb analysis to the facts of *Rakas*).

[89] Rawlings v. Kentucky, 448 U.S. at 105; Rakas v. Illinois, 439 U.S. at 143, 149 n.17.

[90] *See* note 76 and accompanying text *supra*.

[91] 439 U.S. at 143 n.12. The Court also noted that one's legitimate presence on the premises searched, while no longer a controlling consideration, was still not "irrelevant" to one's expectation of privacy. *Id.* at 148.

The Court's reliance upon an individual's power to exclude others from the premises searched as an indication of a protectible fourth amendment interest reflects the influence of earlier decisions in which this power was deemed determinative.[92] This influence can also be seen in *Rawlings,* in which the Court emphasized the defendant's inability to exclude others from the purse in which he had placed drugs as proof of the unreasonableness of his privacy expectation.[93]

In light of the *Rakas* majority's failure to clearly delineate the factors to be considered in evaluating an individual's privacy expectation claim, Justice Powell, in a concurring opinion, attempted to set forth four such considerations. First, a court should examine whether the person seeking to invoke the protection of the fourth amendment took normal precautions to maintain his privacy.[94] A second factor to be considered is the manner in which a defendant has used the premises searched.[95] Third, the history of the fourth amendment should be considered to determine whether the governmental intrusion would have been objectionable to the framers of the Constitution.[96] Justice Powell's final indicator of a legitimate expectation of privacy is the extent to which an individual can show property rights which were invaded by the search and seizure.[97] In the absence of a clear-cut exposition of the

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[92] *See* Katz v. United States, 389 U.S. at 352 (individual who occupied phone booth and shut door to exclude others entitled to fourth amendment protection); Jones v. United States, 362 U.S. 257 (1960), *construed in* Rakas v. Illinois, 439 U.S. at 149 (emphasizing fact that Jones could exclude all others except friend from the friend's apartment).

[93] *See* 448 U.S. at 105. *But cf.* W. LAFAVE, SEARCH AND SEIZURE § 11.3, at 112-13 (Supp. 1981) (criticizing the inability to exclude reasoning of *Rawlings* as erroneous and inconsistent with prior standing decisions).

[94] 439 U.S. at 152-53. *See* United States v. Andrews, 618 F.2d 646, 651-52 (10th Cir.) (no expectation of privacy in package containing drugs sent by air cargo wrapped only in brown paper), *cert. denied,* 449 U.S. 824 (1980).

[95] 439 U.S. at 153. Justice Powell cited *Jones v. United States* as an example of a case in which a defendant had obtained a privacy interest in an area he did not own by virtue of his use of the premises. *Id.*

[96] *Id.* (citing United States v. Chadwick, 433 U.S. 1, 7-9 (1977)). It has been suggested that this final category may serve as a "catch-all" for the privacy interests that are not easily placed into one of the other factors outlined. Comment, *Rakas v. Illinois: The End of Fourth Amendment Standing But Not of Fourth Amendment Confusion,* 46 BROOKLYN L. REV. 123, 141 n.100 (1979).

[97] 439 U.S. at 153; *see* notes 90 through 93 and accompanying text *supra.*

It should be noted that the factors outlined by Justice Powell are merely guides to be used in determining the larger question of whether a defendant possesses an actual expectation of privacy that society considers reasonable. *See* note 73 *supra.* It is clear that the passage of federal and state legislation granting privacy protection to individuals in certain situations would, by itself, create actual privacy expectations that must relevant factors by a majority of the Court,[98] lower courts have been forced to apply the factors outlined by Justice Powell.[99] Additional gui-

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then be considered to be reasonable. Additionally, state courts could interpret their own constitutions so as to provide their citizens greater expectation of freedom from invasions of privacy than accorded under the United States Constitution, *see* note 9 *supra,* thereby mitigating the effect of the Supreme Court's restrictive interpretation of fourth amendment protections. For example, in United States v. Miller, 425 U.S. 435 (1976), the Supreme Court held that a bank customer lacked the requisite fourth amendment interest to challenge subpoenas to the bank for records of his transactions. Since *Miller,* three state legislatures have enacted statutes granting bank depositors an actual expectation that their bank records will not be inspected by government officials without notice and an opportunity to contest the inspection. Additionally, courts in at least two states have rejected the *Miller* rationale and determined, in effect, that their state constitutions grant depositers a reasonable expectation of privacy in their bank records. Depositers in such states could then legitimately argue, despite *Miller,* that *Katz* had been satisfied. For a comprehensive discussion of the *Miller* decision and the implications of later state legislative or judicial determinations, see Note, *Reasonable Expectations of Privacy in Bank Records: A Reappraisal of United States v. Miller and Bank Depositor Privacy Rights,* 72 J. CRIM. L. & CRIMINOLOGY 243, 270-91 (1981).

[98] In *Rawlings v. Kentucky,* the majority determined that the defendant, who had given illegal drugs to his companion, Cox, lacked a legitimate expectation of privacy in Cox's purse, where the drugs were found. The Court relied on the following factors in reaching this conclusion: (1) Rawlings had known Cox only a few days, (2) he had not previously sought or received access to her purse, (3) he had no right to exclude others from Cox's purse, (4) another companion had rummaged through her purse earlier that morning, (5) the transaction was too "precipitous" to support a finding that Rawlings took precautions to maintain his privacy, and (6) Rawlings admitted that "he had no subjective expectation that Cox's purse would remain free from governmental intrusion." 448 U.S. at 104-05. It is unclear to what extent these factors will control the determination of privacy expectations in future cases. Professor Wayne R. LaFave has severely criticized the Court's reliance on the *Rawlings* factors. *See* W. LAFAVE, *supra* note 93, at 111-15.

[99] *See* United States v. Foskey, 636 F.2d 517, 520-21 (D.C. Cir. 1980) (no expectation of privacy in bag under gas tank flap); United States v. Arboleda, 633 F.2d 985, 991 (2d Cir. 1980) (no privacy interest in ledge outside apartment window), *cert. denied,* 450 U.S. 917 (1981); United States v. Smith, 621 F.2d 483, 487 (2d Cir. 1980) (listing factors and finding no legitimate expectation of privacy).

Cases which have discussed the legitimate expectation of privacy requirement since *Rakas* include: Walter v. United States, 447 U.S. 649, 658-59 (1980) (legitimate expectation of privacy not lost by consignee when third party opens package prior to receipt by consignee); United States v. Cortina, 630 F.2d 1207, 1215-16 (7th Cir. 1980) (legitimate expectation of privacy not required to be shown by defendants in order for court to invoke supervisory power to suppress evidence); United States v. Bailey, 628 F.2d 938, 942-43 (6th Cir. 1980) (electronic beeper surveillance may invade an individual's legitimate expectation of privacy); United States v. Agapito, 620 F.2d 324, 331, 334 (2d Cir.) (granting standing to occupant of motel room but noting lesser expectation of privacy in rented areas as contrasted with home), *cert. denied,* 449 U.S. 834 (1980); United States v. Vicknair, 610 F.2d 372, 379-81 (5th Cir.) (discussion of expectation of privacy requiredance by the Court on the legitimate expectation of privacy standard is needed in future cases so that lower courts may determine exactly which non-possessory factors are important in determining one's privacy interest in an area.

D. *Special Situations*

1. Automobile Searches

The Court in *Rakas* declined to determine whether the showing necessary to establish a legitimate expectation of privacy when the area searched is an automobile is different from that required when the area searched is a dwelling.[100] However, the Court did note the distinction which traditionally has been drawn between the two areas[101] and this reference, coupled with the absence of any contrary language, clearly intimates that one must make a more substantial showing in order to attain a privacy interest in a car than in a dwelling.

Justice Powell, concurring in *Rakas,* answered the question the majority skirted by expressly finding that a lesser expectation of privacy existed in cars than in homes.[102] Justice White, dissenting, attacked this conclusion by stating that it was contrary to the everyday expectations of individuals[103] and would result in the abrogation of le-

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ment), *cert. denied,* 449 U.S. 823 (1980); American Motors Corp. v. FTC, 601 F.2d 1329, 1338 (6th Cir.) (parties who place documents in channels of commerce in the normal course of business do not ordinarily retain a legitimate expectation of privacy in them), *cert. denied,* 444 U.S. 941 (1979); United States v. Tolbert, 517 F. Supp. 1081, 1084-94 (E.D. Mich. 1981) (discussion of interaction between abandonment doctrine and expectation of privacy requirement).

[100] 439 U.S. at 148. The Court determined that petitioners' claim would have failed even if the search had been in a dwelling. *Id.*

[101] *Id.*; *see, e.g.,* United States v. Chadwick, 433 U.S. 1, 12-13 (1977) (automobile has a diminished expectation of privacy because it is not designed to hold personal effects and is subject to extensive governmental regulation); United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976) (one's expectation of privacy in a car is substantially different from traditional expectation of privacy in a home); Cardwell v. Lewis, 417 U.S. 583, 590 (1974) (plurality opinion) (lesser expectation of privacy exists in a car because its function is transportation and it serves no residential or permanent storage function); Chambers v. Moroney, 399 U.S. 42, 48 (1970) (for purposes of the fourth amendment there is a constitutional difference between cars and houses); Carroll v. United States, 267 U.S. 132, 153-55 (1925) (inherent mobility of automobile permits lower standard of reasonableness for searching a vehicle than for other places).

[102] 439 U.S. at 153-55. Justice Powell noted: "There are sound reasons for this distinction: Automobiles operate on public streets; they are serviced in public places; they stop frequently; they are usually parked in public places; their interiors are highly visible; and they are subject to extensive regulation and inspection." *Id.* at 154 n.2.

[103] 439 U.S. at 167, 168 n.21.

gitimate privacy interests for all occupants of a car other than the owner.[104]

Rakas held that mere passengers[105] do not have a legitimate expectation of privacy in the glove compartment, the area under the car seat, or the trunk—in essence, in any part of the car.[106] Lower court decisions since *Rakas* have generally reflected the apparent requirement of a possessory interest in a car in order to contest a search of the vehicle.[107] Judging by the literal language of the fourth amendment, it seems incongrous that automobile passengers should have to forfeit a large part of the amendment's protection simply because they fail to attain a formal property interest in the car.[108]

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[104] *Id.* at 168-69. Despite the fact that the *Rakas* majority at three different points denied that common-law property interests controlled their determination of fourth amendment rights, *id.* at 143 & n.12, 149 n.17, Justice White, in his dissent, stated that the majority view operated to protect property, not people, and would encourage an "open season" on automobiles by inducing law enforcement officials to illegally search vehicles in an effort to turn up incriminating evidence which the passengers would, in all likelihood, be unable to contest. *See* text accompanying note 59 *supra.*

The *Rakas* Court hinted that an owner of a vehicle who was present at the time of the search would likely have the requisite expectation of privacy in the vehicle to challenge the search. However, if the owner turns over control of the vehicle to another, he may relinquish his expectation of privacy in the vehicle, at least as to the passenger compartment or other areas within the bailee's immediate control. In United States v. Dall, 608 F.2d 910 (1st Cir. 1979), the court deemed the owner's absence from the vehicle so important as to deny his claim to a legitimate expectation of privacy in a locked compartment at the back of the truck, despite the fact that the bailee did not have the key to the locked compartment and despite the bailee's asserted lack of knowledge of the contents. *Id.* at 915. For a pre-*Rakas* look at the significance of the owner's absence from a searched vehicle on his expectation of privacy therein, see United States v. Holmes, 521 F.2d 859, 867 (5th Cir. 1975), *aff'd on rehearing,* 537 F.2d 227, 228 (5th Cir. 1976) (owner who was not present at time of search, but who had been present when electronic beeper was attached to vehicle, has standing); United States v. Nunn, 525 F.2d 958, 959 (5th Cir. 1976) (owner lacked reasonable expectation of privacy in truck on loan to friends); United States v. McConnell, 500 F.2d 347, 348 (5th Cir. 1974) (lessee of rental car lacked standing to contest search of vehicle which he had turned over to codefendant).

[105] 439 U.S. at 148-49. The Court noted that a "passenger qua passenger" would normally not have the requisite privacy interest. The Court then proceeded, however, to distinguish the petitioner's claim from that offered in Jones v. United States, 362 U.S. 257 (1960) and Katz v. United States, 389 U.S. 347 (1967), thereby implying that the grant of a possessory interest, including the right to exclude, to the passenger by the owner would be sufficient to confer a legitimate expectation of privacy to the passenger.

[106] 439 U.S. at 148-49. One commentator has noted, however, that passengers who can demonstrate use of a vehicle on a regular basis may well be able to establish a legitimate expectation of privacy in the place searched. Such a group might include the owner's family members, car pool members, or employees of the car owner. W. RINGEL, *supra* note 80, § 11.6 (2d ed. 1980).

[107] *See, e.g.,* United States v. Sanchez, 635 F.2d 47, 64 (2d Cir. 1980) (possession of car keys, absent showing of ownership or license from owner to possess the car, is insufficient to establish a legitimate expectation of privacy); United States v. Portillo, 633 F.2d

Although precluded from challenging the search of a vehicle in which they are riding, passengers may still contest the initial stop of the vehicle since such a stop involves a personal seizure of all the occupants. Thus, if the stop is found to be illegal, the evidence later gained will be tainted by the initial illegality, and will be inadmissible.[109] It should be noted, however, that the justification necessary for a stop is less than that needed for a search.[110]

2. Electronic Surveillance

In 1967, in *Katz v. United States*,[111] the Supreme Court determined that electronic eavesdropping, even absent a physical trespass onto an individual's premises,[112] constituted a search and seizure and

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1313, 1316-17 (9th Cir. 1980) (passenger who demonstrated neither a property nor a possessory interest in car lacked an expectation of privacy; driver who had possession of the car entrusted to him by owner attained the requisite privacy interest); United States v. Vasquez-Vasquez, 609 F.2d 234, 235 (5th Cir. 1980) (defendant is not "aggrieved" by the search of an automobile in which he had no proprietary or possessory interest); United States v. Burnett, 493 F. Supp. 948, 952 (N.D.N.Y. 1980) (lessee of van and individual who had lessee's written permission to possess the van had legitimate expectations of privacy therein); United States v. Lopez, 474 F. Supp. 943, 946-47 (C.D. Cal. 1979) (a non-owning driver who has permission to use the vehicle has the requisite possessory interest to challenge a search); United States v. Riviera, 465 F. Supp. 402, 411 (S.D.N.Y.) (passenger who fails to demonstrate proprietary interest in car or items seized lacks legitimate expectation of privacy), *aff'd mem. sub nom.*, United States v. Ramirez, 614 F.2d 1292 (2d Cir. 1979).

[108] Justice White, dissenting in *Rakas*, responded to the majority's holding by stating:

> If the owner of the car had not only invited petitioners to join her but had said to them, 'I give you a temporary possessory interest in my vehicle so that you will share the right to privacy that the Supreme Court says that I own,' then apparently the majority would reverse. But people seldom say such things, though they may mean their invitation to encompass them if only they had thought of the problem.

439 U.S. at 167.

Further, after noting that Katz v. United States, 389 U.S. 347 (1967), recognized an expectation of privacy for passengers in a taxicab, Justice White asked, "Why should Fourth Amendment rights be present when one pays a cabdriver for a ride but be absent when one is given a ride by a friend?" 439 U.S. at 167.

[109] 439 U.S. at 160 n.5 (White, J., dissenting).

[110] *Id.* (citing Terry v. Ohio, 392 U.S. 1 (1968)).

[111] 389 U.S. 347 (1967).

[112] The Court in *Katz* rejected the reasoning in Olmstead v. United States, 277 U.S.

was thus subject to the limitations of the fourth amendment.[113] Partly in response to *Katz,* Congress passed Title III of the Omnibus Crime Control and Safe Streets Act of 1968,[114] which established a comprehensive scheme regulating wiretapping and other forms of electronic surveillance.[115] The ability to challenge violations of Title III was limited, as in a previous enactment,[116] to an "aggrieved person."[117] The following year, in *Alderman v. United States,*[118] the Supreme Court noted that this language was intended to be interpreted in accordance with existing rules of standing.[119] The Court then proceeded to designate, in language which deviated slightly from that in Title III,[120] the

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438 (1928), and Goldman v. United States, 316 U.S. 129 (1942), that the fourth amendment could be violated only when there was an actual physical intrusion onto a person's property. 389 U.S. at 352-53.

[113] 389 U.S. at 352-53.

[114] Title III is codified at 18 U.S.C. §§ 2510-2520 (1976).

[115] Although broadly written, Title III does not extend to devices such as an electronic beeper, which broadcasts a signal and is incapable of transmitting speech, or a pen register, which merely records the electronic impulses made when a telephone number is dialed. *See* J. Carr, The Law of Electronic Surveillance § 3.02(3)(b) (1977) (detailing activities which do not constitute interception under Title III).

[116] Fed. R. Crim. P. 41(e) provides that a "person aggrieved by an unlawful search and seizure" is entitled to move to suppress the evidence obtained therefrom. *See* note 4 *supra.*

[117] 18 U.S.C. § 2518(10)(a) (1976). The definition of "aggrieved person" is found in 18 U.S.C. § 2510(11) (1976) and includes "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed."

[118] 394 U.S. 165 (1969).

[119] *Id.* at 175 n.9. *But see* National Lawyers Guild, Raising and Litigating Electronic Surveillance Claims in Criminal Cases § 5.16(c) (1977) (despite legislative history, statute actually operates to contract standing to participants in the conversation monitored).

[120] The wording of 18 U.S.C. § 2510(11) (1976) differs from the *Alderman* formulation in two respects. First, the code definition contains no reference to ownership of the premises where the conversation took place as a basis for standing. Despite this fact, *Alderman's* inclusion of individuals who own the premises in question has been applied to cases arising under Title III. *See* J. Carr, *supra* note 115, § 6.02(1)(b) n.195 (1977) (citing cases). Secondly, the definition in *Alderman* fails to include the statutory grant of standing to persons "against whom the interception was directed." This language is based on wording found in Jones v. United States, 362 U.S. 257 (1960). *See* S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* [1968] U.S. Code Cong. & Ad. News 2112, 2179-80. This same language from *Jones* was later used by the petitioners in *Rakas* in an attempt to persuade the court to adopt a target theory of standing. *See* note 11 *supra.* However, the cases which have considered the significance of this language in Title III have determined that no one falls under the statutory definition of standing unless he also comes under the *Alderman* categories of party to the conversation or owner of the premises. Thus, the judicial definition has been found to be controlling. *See* United States v. Scasino, 513 F.2d 47, 50 (5th Cir. 1975) (statutory langauge reflects existing law

class of persons entitled to contest intercepted conversations. The majority in *Alderman* determined that any individual who was a party to an illegally seized conversation or who owned the premises where the unlawful interception took place was entitled to object to the illegal action.[121]

Alderman remains the landmark case in determining standing to contest evidence obtained through electronic surveillance. The grant of standing to persons whose conversations are unlawfully overheard follows directly from *Katz*[122] and thus easily can be justified under the reasoning adopted in *Rakas*. However, the automatic grant of standing to the owner of the premises,[123] without reference to whether he was present or participated in the conversations, seems to be an endorsement of the very type of property-based view of the fourth amendment the *Rakas* Court purported to abandon. In this instance, the question after *Rakas* is whether the owner of the premises who was implicated by the intercepted conversations had a legitimate expectation of privacy that, regardless of his presence or absence, conversations of third parties on his premises would remain private. The owner should usually be able to show the invasion of a legitimate expectation of privacy when he is present during the illegal surveillance. If he is absent, however, the present Court may well be persuaded to follow the reasoning of the dissenters in *Alderman*[124] and find that the privacy interest of

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of standing); United States v. Ahmad, 347 F. Supp. 912, 933 (M.D. Pa. 1972) (language in Title III is synonymous with *Alderman*), *aff'd in part, rev'd in part on other grounds sub nom.* United States v. Berrigan, 482 F.2d 171 (3d Cir. 1973); J. CARR, *supra* note 115, § 6.02(1)(c) (legislative intent was not to expand standing beyond the judicial interpretation).

[121] 394 U.S. at 176. The *Alderman* opinion noted that states have the ability to expand standing under the exclusionary rule to allow individuals in addition to those protected by Title III to challenge illegal electronic surveillance. *Id.* at 175. However, only two states which have adopted Title III have seen fit to enlarge the class of individuals entitled to object beyond that provided for in Title III. *See* CONN. GEN. STAT. ANN. § 54-41(a)(10), -41(m) (West Supp. 1981) (includes any person named in the order authorizing the interception); MASS. GEN. LAWS ANN. ch. 272, § 99(B) (6) (West 1970) (same). *See generally* C. FISHMAN, WIRETAPPING AND EAVESDROPPING § 265 n.17 (1978) (discussing Connecticut and Massachusetts statutes).

[122] The Court in *Katz* determined that the placement without prior judicial approval of an electronic bug on the outside of a telephone booth occupied by defendant was an unlawful violation of defendant's right of privacy. 389 U.S. at 351-52.

[123] *See* text accompanying note 121 *supra*.

[124] Justices Harlan and Stewart, who dissented in part in *Alderman*, objected to protecting the owner of the invaded premises by allowing him to exclude third-party conversations intercepted on his premises. Justice Harlan stated, "The absent property owner does not have a property interest of any sort in a conversation in which he did not

an absent party cannot be violated by the fact that conversations of third parties were illegally obtained.[125]

III. The Road Ahead: Additional Standing Considerations

The law of standing represents a balance between two opposing objectives: deterrence of illegal police conduct and the societal interest in the introduction of all relevant evidence in a criminal prosecution. The exclusionary rule is the mechanism by which law enforcement officials are deterred from using improper methods to obtain evidence. The Supreme Court has indicated, however, on a number of occasions, its reluctance to exploit fully the deterrent capabilities of the rule, since to do so often inures to the benefit of the criminal and tends to inhibit the active pursuit of those engaged in illegal activities.[126] It is apparent, then, that the Court has decided to use the procedural context of standing as a means of restricting the application of a substantive rule which has fallen into disfavor. It is submitted that, instead of adopting such an approach, the Court should address directly the continued validity and efficacy of the exclusionary rule itself rather than distorting other doctrines to effect the desired change in judicial policy.[127]

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participate." 394 U.S. at 190 (Harlan, J., dissenting).

[125] By way of analogy, some courts have determined that a car owner who is not present at the time of an illegal search lacks standing to challenge the search, despite his property interest in the car. For a discussion of this point, see note 104 *supra.*

[126] *See* text accompanying note 37 *supra.*

[127] The exclusionary rule has been the subject of a great deal of spirited debate, both by courts and legal commentators, for a number of years. Several members of the United States Supreme Court have indicated their dissatisfaction with the rule. *See* California v. Minjares, 443 U.S. 916, 916-28 (1979) (Rehnquist, J., dissenting from denial of stay) (urging abolition of exclusionary rule and listing civil action as viable alternative); Stone v. Powell, 428 U.S. 465, 537-38 (1975) (White, J., dissenting) (calling for substantial limitation on the scope of the rule); Coolidge v. New Hampshire, 403 U.S. 443, 510 (1971) (Black, J., concurring and dissenting, joined by Blackmun, J.) ("the Fourth Amendment supports no exclusionary rule"); Bivens v. Six Unknown Named Agents, 403 U.S. 388, 415, 422-27 (1971) (Burger, C.J., dissenting) (calling for replacement of the rule with a statutory remedy for recovery of damages). *See generally* W. LaFave, *supra* note 93, § 1.2 (evaluating the alternatives presented by members of the Court). The concept of a "good faith" exception to the rule has been urged as a means of modifying the rule's broad scope, yet retaining its deterrent capabilities. *See* United States v. Williams, 622 F.2d 830, 840-46 (5th Cir. 1980) (en banc) (unconstitutionally seized evidence is admissible at trial provided the officer who seized the evidence acted pursuant to a reasonable good faith belief that his actions were lawful), *cert. denied*, 449 U.S. 1127 (1981); Ball, *Good Faith and the Fourth Amendment: The "Reasonable" Exception to the Exclusionary Rule*, 69 J. Crim. L. & Criminology 635, 644-57 (1978) (analyzing good faith

A. *The Impeachment Issue*

A primary question remaining after the recent pronouncements on fourth amendment standing is whether testimony given by a defendant at a suppression hearing is admissible at trial to impeach the credibility of the defendant. In *Simmons v. United States,* the Supreme Court ruled that when a defendant testifies in support of a motion to suppress, "his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection."[128] The Court did not determine the more limited question of whether such testimony would be admissible for the purpose of impeachment.[129] Lan-

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exception); Wright, *Must the Criminal Go Free if the Constable Blunders?,* 50 TEX. L. REV. 736, 745 (1972) (proposing good faith exception). For a discussion of the continued effectiveness of the exclusionary rule and suggestions for meaningful alternatives, see S. SCHLESINGER, EXCLUSIONARY INJUSTICE 71-85 (1977) (urging adoption of independent review board and civil action for damages to replace rule); Dellinger, *Of Rights and Remedies: The Constitution as a Sword,* 85 HARV. L. REV. 1532, 1552-64 (1972) (considering feasibility of action for damages as replacement for rule); Geller, *Enforcing the Fourth Amendment: The Exclusionary Rule and its Alternatives,* 1975 WASH. U.L.Q. 621, 686-721 (1975) (analyzing alternatives and urging retention of the rule); Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665, 718, 755-57 (1970) (empirical study concluding that the rule has no deterrent effect and proposing the adoption of a tort remedy to replace the rule).

As a point of reference, the Comptroller General of the United States determined, in a report issued in 1979, that the exclusionary rule does not have a statistically large effect on federal prosecutions. This finding resulted from a study by the General Accounting Office of 2,804 defendants charged in 38 United States Attorneys' offices during 1978. Only 11% of the defendants in the study filed a motion to suppress on fourth amendment grounds and a high percentage of these motions were denied, leaving only 1.3% of the 2,804 cases in which evidence was excluded by a motion to suppress. The study concluded that the granting of a fourth amendment motion did appear to reduce the likelihood of the defendant being convicted. However, the rule was found to have little direct impact on the case-screening process, as the U.S. Attorneys indicated that search and seizure problems were the primary reason for deciding not to prosecute in only 0.4% of the total declined cases. GENERAL GOVERNMENT DIVISION, GENERAL ACCOUNTING OFFICE, IMPACT OF THE EXCLUSIONARY RULE ON FEDERAL CRIMINAL PROSECUTIONS 6-14 (1979) (Report of the Comptroller General).

[128] 390 U.S. at 394.

[129] The March, 1969 and March, 1971 drafts of the Federal Rules of Evidence contained the following sentence at the end of rule 104(d) with reference to a criminal defendant: "Testimony given by him at a hearing in which he is asserting any constitutional rights, or any right to have evidence suppressed or excluded, is not admissible against him as substantive evidence but may be used for impeachment if clearly contradictory of testimony given by him at the trial." This language was omitted from the final version.

In the absence of any such language in the rule as adopted, the Advisory Committee's Note to rule 104(d) simply states: "The rule does not address itself to questions of guage in *Brown v. United States,*[130] decided five years after *Simmons,* implied that only direct use of the suppression hearing testimony in the prosecution's case-in-chief was prohibited.[131] Several courts which have considered the question have held that such testimony is admissible in evidence for impeachment purposes.[132] Justice Marshall, dissenting in *Salvucci,* contended that the majority opinion hinted that use for impeachment purposes was permissible.[133]

A decision by the Court allowing the use of suppression hearing testimony in such a manner would have the admirable quality of discouraging perjurious statements by defendants at trial and would be consistent with the Court's decisions allowing impeachment in purely fifth amendment contexts.[134] Additionally, it is clear that use of sup-

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the subsequent use of testimony given by an accused at a hearing on a preliminary matter." Rule 104(d) in its present form thus leaves open the question of use of a transcript of pretrial testimony at the trial itself.

The elimination of the language at the end of rule 104(d) apparently resulted from a reluctance to adopt an evidentiary rule in an area involving constitutional rights that was still being shaped by case law. 1 WEINSTEIN'S EVIDENCE ¶ 104 [10] (1979). Additionally, the deletion served to preclude potential Senate opposition to the absolute prohibition on the use of earlier testimony as substantive evidence at trial. *Id.;* P. ROTHSTEIN, UNDERSTANDING THE NEW FEDERAL RULES OF EVIDENCE 9-10 (1973). Accordingly, the removal of the language should probably not be viewed as a rejection of the ability of the prosecution to use suppression hearing testimony to impeach the defendant's testimony at trial.

[130] 411 U.S. 223 (1973).

[131] The Court stated that suppression hearing testimony "is not *directly* admissible" against a defendant at trial. *Id.* at 228 (emphasis supplied).

[132] Cases which have allowed suppression hearing testimony to be used for impeachment include: Woody v. United States, 379 F.2d 130, 131-32 (D.C. Cir.), *cert. denied,* 389 U.S. 961 (1967); People v. Douglas, 66 Cal. App. 3d 998, 136 Cal. Rptr. 358, 363 (1977); People v. Sturgis, 58 Ill. 2d 211, 317 N.E.2d 545, 548 (1974); Gray v. State, 43 Md. App. 238, 403 A.2d 853, 858 (1979). The opinion in *Woody,* decided one year before *Simmons,* was written by Judge Warren Burger of the Court of Appeals for the District of Columbia Circuit.

[133] 448 U.S. at 96-97.

[134] In Walder v. United States, 347 U.S. 62, 65 (1954), the Supreme Court held that illegally acquired physical evidence was admissible at trial for the purpose of impeaching the defendant's testimony. Relying on *Walder,* the Court, in Harris v. New York, 401 U.S. 222, 225-26 (1971), ruled that a defendant's confession obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), could be introduced to impeach testimony given by a defendant on direct examination at trial. In Oregon v. Hass, 420 U.S. 714, 722 (1975), the Court extended the scope of *Harris* by holding that statements made by a defendant after receiving the *Miranda* warnings and after requesting to speak to an attorney were admissible for impeachment purposes. The Court so held despite the fact that *Miranda* requires police questioning to cease after an individual requests an attorney. In addressing the deterrent-effect argument, the *Hass* Court found that "there is

pression hearing testimony for impeachment purposes would give new substance to the Court's previously expressed warning that "[t]he protective shield of Simmons is not to be converted into a license for false representations."[135]

On the other hand, such a decision would serve to resurrect partially the "intolerable" conflict between the privilege against self-incrimination and the proper exercise of fourth amendment rights which mandated the decision in *Simmons*.[136] A modification of the "use" immunity[137] provided in *Simmons*, however, would seem to be the next logical step for the Court to take if it continues to follow the reasoning of its recent standing decisions. Such a ruling would be especially important in light of the abolition of automatic standing in *Salvucci*, since a defendant must now testify in order to establish a legitimate

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sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 722. In 1980, the Court took *Harris* a step further by holding, in United States v. Havens, 446 U.S. 620, 627-28 (1980), that it was permissible to use illegally obtained evidence to impeach statements made by a defendant in response to the prosecution's cross-examination, provided the questions were reasonably suggested by the defendant's direct examination.

In contrast to these holdings, the Court has, in another fifth amendment context, refused to allow certain pretrial testimony to be used for purposes of impeachment. In New Jersey v. Portash, 440 U.S. 450, 459-60 (1979), the Court ruled that the use of a person's grand jury testimony, given in response to a grant of immunity, to impeach his later testimony at trial was a violation of the privilege against self-incrimination. While one can readily analogize the grant of immunity in *Portash* to the use immunity provided by *Simmons v. United States, see* note 137 *infra,* it is unclear to what extent the Court would follow this reasoning over that outlined in *Walder* and *Harris* when considering the use of suppression hearing testimony for impeachment purposes.

[135] United States v. Kahan, 415 U.S. 239, 243 (1974). In Harris v. New York, 401 U.S. 222 (1971), the Supreme Court, in wording analogous to that used in *Kahan,* stated: "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." *Id.* at 226.

[136] The *Simmons* Court found it "intolerable that one constitutional right should have to be surrendered in order to assert another." 390 U.S. at 394; *see* text accompanying notes 24 through 27 *supra*.

[137] "Use" immunity affords a witness protection from use of the pretrial testimony in a subsequent prosecution, but does not preclude prosecution on the crime to which the evidence relates. It is thus distinct from "transactional" immunity which prohibits prosecution of the witness for crimes to which his testimony relates but allows the Government to use such testimony against the witness on other charges. Kastigar v. United States, 406 U.S. 441, 443 (1972); Comment, *Grand Jury Immunity in Mississippi,* 49 MISS. L.J. 591, 591-92 (1978).

For a discussion of considerations involved in resolving conflicts between constitutional guarantees, see Note, *Resolving Tensions Between Constitutional Rights: Use Immunity in Concurrent or Related Proceedings,* 76 COLUM. L. REV. 674, 694-712 (1976).

expectation of privacy in an item seized, even when charged with a crime of possession.[138] As it now stands, the prosecution enjoys a tactical advantage with the removal of the *Jones* protection, since "the opportunity for cross-examination at the suppression hearing may enable the prosecutor to elicit incriminating information beyond that offered on direct examination,"[139] thus aiding the prosecution in developing its case and determining its trial strategy.[140] If the use of suppression hearing testimony for impeachment were allowed, a defendant who earlier admitted possession of property in order to be able to contest its seizure would almost be forced to avoid testifying at trial.[141] If the purpose of the automatic standing rule was to eliminate conflict between provisions of the Bill of Rights, and if *Salvucci* abolished automatic standing because the self-incrimination dilemma was cured in *Simmons,* then the extent to which *Simmons* realistically offers protection to a defendant who wishes to testify in his own behalf should be reexamined.

B. United States v. Payner *and the Supervisory Powers*

As has been noted, the Supreme Court has expressly refused in the recent past to extend fourth amendment standing to parties other than the immediate victim of the illegal search and seizure.[142] The Court's determination to apply this principle rigidly was reflected in its 1980 decision in *United States v. Payner.*[143] In this case, an Internal Revenue Service agent made an illegal seizure of a briefcase belonging to an officer of a Bahamian bank and copied numerous documents in it. Information obtained from the documents led to the indictment and prosecution of Payner, a customer of the bank, on tax evasion charges.[144] Although the lower courts found that no fourth amendment rights of the defendant were violated by the illegal seizure, the evidence was excluded at trial. The courts determined that the government's knowing, willful, and bad-faith violation of the bank officer's constitutional rights required the exclusion of the evidence by virtue of the inherent supervisory powers of the federal courts.[145] The Supreme Court reversed. The Court, after holding that the defendant lacked standing,[146] ruled that the prohibition on vicarious standing applied with equal force when a court sought to exercise its supervisory powers on an exclusionary issue as when the court analyzed the question under the fourth amendment.[147] The Court thus rejected the dissent's contention that the federal courts should not sanction the deliberate and intentional violation of the law of search and seizure by the government, despite the inability of a particular defendant to challenge the action himself.[148] The effect of *Payner* is to preclude federal courts from accomplishing themselves what the Supreme Court, by virtue of the restrictions placed on standing, has refused to allow individual defendants to accomplish. The decision also opens the door for considerable criticism of the Court's restrictive approach to standing.[149] Since a defendant cannot use the exclusionary rule to contest evidence obtained through violation of a third party's rights, and since the Court in *Payner* determined the scope of the supervisory powers simply by reference to the balance of interests involved in applying the exclusionary rule,[150] the invitation to law enforcement personnel to violate the rights of third parties in order to obtain evidence for possible use against the target of an investigation is undeniably present.[151] Unscrupulous lawmen may be encouraged to manipulate the standing limitations by increasing the number of illegal searches of third parties whom they have no intention of actually prosecuting.[152] The Court's refusal to discourage such activities by virtue of the supervisory powers in a case where the government's intentional misconduct was described by the lower court as "flagrantly illegal"[153] causes one to question how the Court will react to the resulting taint placed on the judicial process. The Supreme Court should either restrict *Payner* to exclude cases involving a deliberate manipulation of the standing limitation or develop other measures to ensure that the integrity of the judicial system is not endangered by the Court's reluctance to enforce the spirit, if not the letter, of the law under the fourth amendment.[154]

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[138] *See* United States v. Salvucci, 448 U.S. at 95-97 (Marshall, J., dissenting) (abolition of automatic standing means benefit to prosecutors). *But see* United States v. Molina-Garcia, 634 F.2d 217, 221 (5th Cir. 1981) (Tate, J., concurring) (abolition of automatic standing does not mean that defendants must formally take the stand at suppression hearing when their expectation of privacy in a certain item or location is self-evident).

[139] 448 U.S. at 96.

[140] *Id.*

[141] One legal commentator has described the current state of the law in this area as "a system that polices the police with exclusionary rules depriving the court of evidence and polices the defendant with an impeachment exception that may deprive the court of the defendant's testimony." *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 87 (1980).

[142] *See* Rakas v. Illinois, 439 U.S. at 132-38 (rejection of target theory); Alderman v. United States, 394 U.S. at 174-75 (rejecting vicarious standing by finding the benefits of deterrence to be outweighed by the costs of exclusion).

[143] 447 U.S. 727 (1980).

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[144] *Id.* at 729-30.

[145] *Id.* at 730-31.

[146] The Court determined that Payner had no expectation of privacy in the seized bank documents and thus was unable to show the violation of a fourth amendment right. *Id.* at 731 & n.4, 732.

[147] *Id.* at 733-36.

[148] *Id.* at 746-48 (Marshall, J., dissenting).

[149] *See* Rakas v. Illinois, 439 U.S. at 132-38 (rejecting the target theory).

[150] 447 U.S. at 736; *see* note 147 and accompanying text *supra.*

[151] Justice Marshall, dissenting in *Payner,* quoted the district court's determination that "the Government affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to purposefully conduct an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion." 447 U.S. at 748 (quoting United States v. Payner, 434 F. Supp. 113, 132-33 (N.D. Ohio 1977)).

CONCLUSION

The exclusionary rule has now been applicable to federal courts for almost seventy years and to the state courts for twenty years.[155] The controversy[156] surrounding the rule today reflects the various opinions voiced regarding its effectiveness in deterring illegal police conduct while still preserving the societal interest in the successful curtailment of criminal conduct. The Supreme Court's apparent determination to use the standing requirement as a procedural restraint on a substantive rule that has been subject to extensive criticism ignores the problems inherent in the rule itself and tends to encourage the very type of behavior which the rule originally was designed to combat.[157] The narrowly-structured application of the legitimate expectation of privacy requirement, the failure of the Court to consider properly one's ownership of a seized item, the abolition of the automatic standing doctrine, and the discarding of the legitimately on the premises test all operate to deny protection to individuals who, if only in an indirect way, have traditionally been regarded as victims of illegal government action. The strong emphasis placed on a defendant's property and possessory interests in the area searched unfairly limits the number of defendants entitled to contest illegal action because it assumes that citizens conduct their affairs by means of formalistic proof of territorial control rather than by common sense understandings developed to meet the realities of everyday living.[158] While the Court's concern over the operation of the exclusionary rule is understandable, the solution should be an examination of the rule itself, and not a limitation on the number of people entitled to invoke the rule. Until the Court adopts some equally effective means of discouraging unreasonable searches and seizures, all citizens, whether innocent or guilty, necessarily must depend on access to the exclusionary rule in order to preserve the rights granted them under the fourth amendment.

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[152] Justice White, dissenting in *Rakas,* made a similar determination with regard to stops of automobiles by law enforcement officials on the chance that an illegal search would turn up evidence which a mere passenger would be unable to suppress. *See* note 104 and accompanying text *supra.*

[153] 447 U.S. at 729.

[154] For a discussion of criteria which would aid the court in determining when the exercise of the supervisory powers in a *Payner*-like situation would be appropriate, see *The Supreme Court, 1979 Term,* 94 HARV. L. REV. 77, 194-96 (1980).

[155] *See* note 1 *supra.*

[156] For an update on judicial and legislative dissatisfaction with the exclusionary rule, see Moya, *Picking On the Poisonous Fruit,* Nat'l L.J., June 8, 1981, at 1, col. 1; Nat'l L.J., June 22, 1981, at 9, col. 3; Graynor & Gross, *Recent High Court Jousts With the Exclusionary Rule,* Nat'l L.J., Nov. 9, 1981, at 26, col. l.

[157] *See* note 2 and accompanying text *supra.*

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[158] *See* State v. Alston, 87 N.J. 531, 436 A.2d 81, 88-89 (1981) (legitimate expectation of privacy standard produces results contrary to individual's actual expectations); notes 103, 108 and accompanying text *supra.*

THE DIVISIBLE DIVORCE DOCTRINE REEXAMINED IN LIGHT OF *SHAFFER V. HEITNER*

State courts have held repeatedly that the jurisdictional predicates for a divorce are met if at least one of the spouses involved is domiciled within the forum state.[1] The absent spouse's contacts, if any, with the forum are not considered. Although this practice has been found to be constitutional in the past,[2] this comment will demonstrate that granting a divorce without considering the absent spouse's contacts with the forum[3] cannot be reconciled with the United States Supreme Court's reasoning in *Shaffer v. Heitner*[4] and its progeny.[5] It will also show that the failure to apply the minimum contacts standard elucidated in *International Shoe Co. v. Washington*[6] is often unfair to the absent spouse and that the mere domicile of one spouse within the forum state is insufficient to meet that standard.[7]

I. Development of State Court Jurisdictional Theory

For almost a century, Justice Field's opinion in *Pennoyer v. Neff*[8] provided the conceptual framework in which problems of state court jurisdiction were cast.[9] *Pennoyer* invalidated a default judgment against a nonresident defendant who did not receive personal service of process.[10] Two fundamental problems were presented to the Court in this case: providing assurance that the defendant will have reasonable notice of the action against him and restricting the judicial power of the states to matters that are of proper local concern.[11] In formulating the solution to these problems the Court distinguished between actions in personam and actions in rem.[12] The Court held that in personam jurisdiction could be obtained by a state court only if the defendant was both within the state's territory and personally served with notice.[13] Similarly, in rem jurisdiction could be obtained only if the property or *res* was both within the state's territory and the state court seized the property.[14]

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[1] *See, e.g.*, Wood v. Wood, 100 Idaho 387, 597 P.2d 1077, 1079 (1979) (in personam jurisdiction unnecessary to dissolve marriage); Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App. 1979) (same).

[2] Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957); Williams v. North Carolina, 317 U.S. 287, 298-99 (1942) (Williams I); Pennoyer v. Neff, 95 U.S. 714, 734-35 (1877).

[3] *See* cases cited at note 88 and accompanying text *infra*.

[4] 433 U.S. 186 (1977).

[5] Rush v. Savchuk, 444 U.S. 320 (1980); World-Wide Volkswagon v. Woodson, 444 U.S. 286 (1980); Kulko v. California Super. Ct., 436 U.S. 84 (1978).

[6] 326 U.S. 310 (1945).

[7] The only state court that has applied the minimum contacts standard to divorce proceedings found the domicile of the plaintiff in the forum state sufficient to meet due process requirements. *In re* Rinderknecht, 367 N.E.2d 1128, 1134-35 (Ind. Ct. App. 1977).

[8] 95 U.S. 714 (1877).

[9] *See generally* Hazard, *A General Theory of State-Court Jurisdiction,* 1965 Sup. Ct. Rev. 241, 241-43 (discussing endurance of *Pennoyer* rationale).

[10] 95 U.S. at 734.

The majority opinion in *Pennoyer* explicitly adopted the territorial jurisdiction theory expressed by Justice Story in his writings on the conflict of laws.[15] Under this theory, a judgment rendered by a state court is binding only upon those over whom the state court has the power to enforce the judgment.[16] Since a state is sovereign only within its territorial boundaries, it has the power to enforce its judgments only against persons or property within its borders.[17] Story's power theory of state court jurisdiction was consistent with nineteenth century legal positivism, which posited that a law was valid only if formulated by a sovereign with the power to enforce it.[18]

The power, or territorial, theory of state court jurisdiction provided a logical, mechanical, and efficient process for determining whether it was proper for a court to assert its jurisdiction. When litigation arose involving absent individuals[19] and corporations,[20] however, practical realities often dictated an expansion of state courts' jurisdictions beyond their borders. To meet these realities without abandoning *Pennoyer's* rationale, the Court developed legal fictions such as the doctrine of implied consent and the presence theory.[21]

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[11] Hazard, *supra* note 9, at 245.

[12] 95 U.S. at 724. Courts have traditionally distinguished three types of jurisdiction. In personam jurisdiction involves personal liability or obligations. In rem jurisdiction involves the interests of all persons in property. Quasi in rem jurisdiction involves the interests of particular persons in property. *See* Hanson v. Denckla, 357 U.S. 235, 246 n.12 (1957) (defining in personam, in rem, and quasi in rem jurisdiction).

[13] 95 U.S. at 722-27.

[14] *Id.*

[15] *Id.* at 722-24. Story pointed out that a state has exclusive sovereignty and jurisdiction only within its territory. Consequently, he reasoned that a state's laws can bind only persons and property within its territory. J. STORY, COMMENTARIES ON THE CONFLICT OF LAWS 19-21 (1834). In formulating this proposition, Story ignored American and English precedent inconsistent with his views. *See, e.g.,* Massie v. Watts, 10 U.S. (6 Cranch) 148, 155-60 (1810) (decree compelling transfer of interest in land located outside jurisdiction); Penn v. Lord Baltimore, 1 Ves. 444, 27 Eng. Rep. 1132, 1139 (Ch. 1750) (affirming decree determining property interests outside territorial limits of court).

[16] In McDonald v. Mabee, 243 U.S. 90 (1917), the Court stated that "[t]he foundation of jurisdiction is physical power." *Id.* at 91.

[17] 95 U.S. at 722-24.

[18] One of the most important works on legal philosophy written in the nineteenth century was John Austin's THE PROVINCE OF JURISPRUDENCE DETERMINED (1832), which propounded a theory of law based upon sovereignty. *Id.* at 191-361, *discussed in* H. HART, THE CONCEPT OF LAW 18-25 (1961).

In *Harris v. Balk*[22] the doctrine of quasi in rem jurisdiction was promulgated, dramatically expanding the scope of state court jurisdiction. Harris, a North Carolina resident, owed a debt to Balk, also a resident of North Carolina. While Harris was visiting Maryland, Epstein, a creditor of Balk, attached the debt.[23] Rejecting the theory that jurisdiction depended upon the original situs of the debt, the Court held there was jurisdiction to attach the debt in any state where the debtor could be found.[24] *Pennoyer* would have required the court to seize the property in an in rem proceeding to give the owner notice of the action.[25] But since a debt or other intangible cannot be seized physically, *Harris* achieved the same end by requiring the garnishor to give the debtor, through service of process, notice of both the suit and the obligation to refrain from paying the debt.[26]

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[19] For instance, to ensure that nonresident motorists answered for automobile accidents within their territory, some states enacted laws providing their courts with jurisdiction over nonresident motorists for claims arising within the state. *See generally* Jax, *Non-Resident Motorists Service of Process Acts,* 33 F.R.D. 151, 153-54 (1963) (discussing the speed with which statutes were enacted). In Hess v. Pawloski, 274 U.S. 352 (1927), the Supreme Court approved the constitutionality of a nonresident motorist statute, reasoning that nonresident motorists impliedly consent to the state court's jurisdiction when they use the state's roads. *Id.* at 356. Later, the Court held that notice must be sent to the absentee motorist. Wuchter v. Pizzutti, 276 U.S. 13, 19 (1928).

Another problem arose when a domiciliary of the forum state was absent from the forum. Milliken v. Meyer, 311 U.S. 457 (1940), abrogated the force of *Pennoyer's* territorial restrictions by allowing a court to assert jurisdiction over an absent domiciliary. *Id.* at 462-64.

[20] The early view, that a corporation could be sued only where it was incorporated, caused a great deal of inconvenience and injustice. St. Clair v. Cox, 106 U.S. 350, 355 (1882). To resolve this problem, the Court theorized that since a state may impose conditions upon a corporation's doing business in the state, it may also require that a corporation doing business in the state consent to service of process in litigation arising out of its business activities. *Id.* at 356.

In other cases, the Court found that a foreign corporation doing business in the state was *present* within the state and therefore subject to the state court's jurisdiction. *See* International Harvestor Co. v. Kentucky, 234 U.S. 579, 589 (1914) (presence of corporation in state necessary for service of process); Green v. Chicago, B. & Q. Ry., 205 U.S. 530, 532 (1907) (validity of service depends upon whether corporation was doing business in such manner as to be deemed present in state). *See generally* 29 MISS. L.J. 91 (1957) (discussing in personam jurisdiction over foreign corporations).

[21] *See* notes 19 and 20 *supra.*

[22] 198 U.S. 215 (1905).

[23] *Id.* at 216.

[24] *Id.* at 222-23. To protect the absent creditor, the debtor-garnishee must give him notice of the action and an opportunity to defend. The absence of such notice prevents the debtor-garnishee from asserting payment of the judgment as a defense in a subse-

International Shoe Co. v. Washington[27] was the Court's first major departure from the *Pennoyer* doctrine. There the issue was whether the state of Washington could obtain in personam jurisdiction in a Washington court over a Delaware corporation.[28] Arguably, the Court could have used the presence theory to uphold the state court's jurisdiction.[29] The Court reasoned, however, that the presence theory failed to address the true issue, whether the corporation's activities within the state were enough to meet due process requirements for in personam jurisdiction.[30] Due process was satisfied, the Court stated, only if the defendant had minimum contacts with the forum "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' "[31]

The minimum contacts standard set forth in *International Shoe* was significantly clarified in *Hanson v. Denckla*.[32] Although acknowledging the trend toward more expansive in personam jurisdiction over nonresident defendants,[33] the Court warned that it would be error to assume that this trend would eventually lead to the abolition of all

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quent action by his debtor. *Id.* at 227.

[25] 95 U.S. at 727.

[26] 198 U.S. at 233.

[27] 326 U.S. 310 (1945).

[28] *Id.* at 311-12.

[29] Although the defendant corporation's principal place of business was not in Washington, the activities of its salesmen resulted in a continuous flow of the corporation's product into the state. *Id.* at 313-14. Probably, this fact would have justified a finding that the corporation was present within the forum. *Cf.* International Harvestor Co. v. Kentucky, 234 U.S. 579, 587 (1914) (continuous flow of defendant's machines into state sufficient to show presence).

[30] 326 U.S. at 316-17. Earlier, Judge Learned Hand, writing for the Second Circuit Court of Appeals, had characterized the word "presence" as a shorthand for the real consideration in issue—the inconvenience of requiring the corporation to defend a suit in the forum state. Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139, 141 (2d Cir. 1930).

[31] 326 U.S. at 316.

[32] 357 U.S. 235 (1958).

[33] *Id.* at 251. In McGee v. International Life Ins. Co., 355 U.S. 220 (1957), the Court stated that expansion of in personam jurisdiction was necessitated by the increased flow of interstate commerce. Also, nonresidents could more easily defend suits because of improved transportation and communications. *Id.* at 222-23.

restrictions upon in personam jurisdiction.[34] The Court held that due process required that the defendant must have purposely availed himself of the benefits and protections of the laws of the forum state before he could be subjected to a judgment in personam.[35] *Hanson* also reiterated the rule that in rem jurisdiction is based upon the presence of the property within the forum state,[36] thus indicating that *International Shoe* had no effect upon the Court's acceptance of the *Pennoyer* rules governing in rem jurisdiction.[37]

Subsequent lower court decisions suggested that the in personam-in rem distinction should be abolished and the minimum contacts standard should be applied to all assertions of state court jurisdiction.[38] For instance, Judge Gibbons, concurring in *Jonnet v. Dollar Savings Bank,*[39] noted that the limitation of fundamental fairness applied to any exercise of state judicial power, whether it was in personam, in rem, or quasi in rem.[40] Gibbons persuasively criticized post-*International Shoe* court decisions which, upon finding the contacts necessary for in personam jurisdiction lacking, proceeded to discuss the fictional situs of intangibles rather than drawing the logical conclusion that the state was without power to hear the case.[41]

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[34] 357 U.S. at 251.

[35] *Id.* at 253.

[36] *Id.* at 246. The harshness of the in rem doctrine was diminished by the Court's decision in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). In that case, the Court held that due process requires that the notice given to the defendant be reasonably calculated to apprise him of the pendency of the action whether the action is in personam or in rem. *Id.* at 312-14.

[37] *See* text accompanying note 14 *supra.*

[38] *See, e.g.,* United States Indus., Inc. v. Gregg, 540 F.2d 142, 154 (3d Cir. 1976) (*International Shoe* applies to quasi in rem actions); Jonnet v. Dollar Sav. Bank, 530 F.2d 1123, 1130-43 (3d Cir. 1976) (Gibbons J., concurring) (irrational to bifurcate *International Shoe's* jurisdictional doctrine). *See generally* Traynor, *Is This Conflict Really Necessary?*, 37 TEX. L. REV. 657, 660-64 (1959) (examining the illogic of the in personam-in rem distinction).

[39] 530 F.2d 1123 (3d Cir. 1976).

[40] *Id.* at 1137. Gibbons pointed out that the Supreme Court cases upholding the validity of state courts' assertion of jurisdiction in foreign attachment were decided before *International Shoe. Id.* at 1131-32. He cited Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 311-13 (1950) as an example of the Court applying the same due process considerations to actions in rem as are applied to actions in personam. 530 F.2d at 1136-37.

[41] 530 F.2d at 1137 (criticizing Steele v. G.D. Searle & Co., 483 F.2d 339, 344-49 (5th Cir. 1973)) (applying the quasi in rem doctrine), *cert. denied,* 415 U.S. 958 (1974); Minichiello v. Rosenberg, 410 F.2d 117, 118-19 (2d Cir. 1968) (en banc) (recognizing the continuing validity of *Harris v. Balk*), *cert. denied,* 396 U.S. 844 (1969).

The Supreme Court's decision in *Shaffer v. Heitner*[42] signaled the total demise of the *Pennoyer* doctrine. There, the Court held that all assertions of state court jurisdiction must meet the *International Shoe* standard.[43] After tracing the history of state court jurisdictional law,[44] the Court, in an opinion by Justice Marshall, noted that since *Pennoyer* had been seriously eroded, the time was ripe to consider whether *International Shoe's* minimum contacts requirement should be applied to in rem actions.[45] The Court reasoned that "jurisdiction over a thing" was in fact a shorthand method of referring to "jurisdiction over the interests of a person in a thing."[46] Since the standard for determining whether there is jurisdiction over the interests of a person is the minimum contacts test, the Court concluded that this standard also should be applied in cases traditionally classified as in rem.[47] This conclusion was buttressed by the inherent unfairness of the in rem doctrine's actual application.[48]

The Court noted that certain in rem actions, such as disputes concerning competing claims to land, would not be affected by its holding, since in these cases the requisite contacts with the forum state were likely to be found.[49] The Court also stated that the particularized rules governing adjudications of status might be found to be consistent with the standard of fairness.[50]

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[42] 433 U.S. 186 (1977).

[43] *Id.* at 212.

[44] *Id.* at 205.

[45] *Id.* at 206.

[46] *Id.* at 207 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

[47] 433 U.S. at 207.

[48] *Id.* at 212. Just as the territorial jurisdiction theory of *Pennoyer* was consistent with the prevailing legal philosophy of the nineteenth century, *see* note 18 and accompanying text *supra, Shaffer's* emphasis on fairness to the defendant is consistent with current legal philosophy. Currently, John Rawls' theory of "justice as fairness" has displaced older, more legalistic theories. *See* J. RAWLS, A THEORY OF JUSTICE (1971), *reviewed in* Neumaier, Book Review, 47 MISS. L.J. 827 (1976). *See generally* C. Kaufman, *The Nature of Justice: John Rawls and Pure Procedural Justice,* 19 WASHBURN L.J. 197 (1980) (comparing Rawls' position with other contemporary theories).

[49] 433 U.S. at 207-08. The Court also mentioned as possible exceptions situations in which the suit arises out of injuries occurring on the property of an absentee landowner or in which ownership is conceded but the suit relates to rights and duties arising out of that ownership. *Id.* at 208. The Court noted that the most drastic effect of its holding would be on quasi in rem actions involving property having no relationship to the issues involved in the litigation. *Id.* at 208-09.

[50] *Id.* at 208 n.30. Footnote 30 states: "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Id.* (citing Traynor,

The Supreme Court's post-*Pennoyer* decisions, culminating in *International Shoe*, evidenced a trend toward a more expansive view of state court jurisdiction.[51] *Shaffer* and its progeny, on the other hand, signal a trend toward more stringent restrictions on the states.[52]

The Court's first post-*Shaffer* decision was *Kulko v. California Superior Court.*[53] There the Court held that the California courts did not have in personam jurisdiction in a child support action over the nonresident father of minor children domiciled in California.[54] Applying what it described as an "effects" test, the California Supreme Court had upheld the trial court's assertion of jurisdiction, reasoning that the father had purposely availed himself of the benefits and protection of California's laws by sending one child to live with his mother in California and consenting to the permanent residence of his child in the state.[55] The United States Supreme Court, however, rejected the California Supreme Court's reasoning. The Court pointed out that the father had merely acquiesced to the unilateral decisions of his children and that the unilateral activity of a person claiming a relationship with a defendant is not a contact with the forum.[56] Nor were the effects of the father's acquiescence a sufficient basis for jurisdiction, since they were non-commercial and caused no injury within the forum.[57] The Court also rejected the argument that California's state interest in the

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supra note 38, at 660-61 (1957) (suggesting that ex parte divorces might be valid without the in rem fiction because of relationship between the defendant, the forum, and the litigation)).

[51] *See* notes 19 through 31 and accompanying text *supra.*

[52] *See* notes 42 through 50 and accompanying text *supra;* notes 53 through 64 and accompanying text *infra.*

[53] 436 U.S. 84 (1978).

[54] *Id.* at 96.

[55] Kulko v. California Super. Ct., 19 Cal. 3d 514, 524-25, 564 P.2d 353, 357-58, 138 Cal. Rptr. 586, 590-91 (1977), *rev'd,* 436 U.S. 84 (1978).

[56] 436 U.S. at 93-94 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).

[57] 436 U.S. at 96. The RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, at 156 (1971) explains the "effects" test in the following language:

> A state has power to exercise judicial jurisdiction over an individual who causes effects in the state by an act done elsewhere with respect to any cause of action arising from these effects unless the nature of the effects and of the individual's relationship to the state make the exercise of such jurisdiction unreasonable.

Noting it was not bound by the Restatement, the Court reasoned that the "effects" test was improperly applied because the test covers only those situations in which a defendant either causes injury within the forum or conducts commercial activities there. 436 U.S. at 96 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 37, Comment a (1971)).

welfare of its resident children was a basis for jurisdiction.[58] In addition, the Court emphasized that considerations of fairness weighed in favor of the father's state of domicile as the proper forum.[59]

In *Rush v. Savchuk,*[60] the Supreme Court quashed a Minnesota resident's attempt to obtain quasi in rem jurisdiction in the Minnesota courts over an Indiana resident.[61] Savchuk was injured in an automobile accident in Indiana while riding as a passenger in Rush's car. Later, he moved to Minnesota and filed a negligence action against Rush in a Minnesota court.[62] Since Rush had no contacts with Minnesota, Savchuk attempted to obtain jurisdiction by attaching Rush's insurance policy; Rush's insurer was licensed to do business in Minnesota. The Minnesota Supreme Court held that Rush's insurance policy was a garnishable *res* for the purpose of obtaining quasi in rem jurisdiction.[63] The United States Supreme Court, however, concluded that since an obligation owed an absent defendant is not a contact with the forum, the Minnesota courts could not constitutionally assert jurisdiction.[64]

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[58] 436 U.S. at 98. California had not displayed a particularized interest by enacting a special jurisdictional statute. In addition, under California's version of the Revised Uniform Reciprocal Enforcement of Support Act of 1968, the mother could have filed a petition in California and had the case adjudicated in a New York court without either party having to leave his own state. CAL. CIV. PROC. CODE §§ 1650-1699 (West 1980).

[59] 436 U.S. at 97. The father had remained in New York, the state of marital domicile, while the mother had moved across the nation. In addition, the Court noted that a reasonable parent would not expect that permitting a child to join his mother would subject the parent to the expense and strain of defending a suit 3,000 miles across the country. *Id.* at 97-98.

[60] 444 U.S. 320 (1980).

[61] *Id.* at 327-33.

[62] *Id.* at 322. Savchuk could not have successfully brought suit in Indiana because of Indiana's automobile guest statute. *See* IND. CODE ANN. § 9-3-3-1 (Burns 1980) (auto guest statute).

[63] 444 U.S. at 323-24. An obligation owed by an insurance company to an insured could be attached if the insurer did business in the forum state under the rule stated in Seider v. Roth, 17 N.Y.2d 111, 216 N.E.2d 312, 314, 269 N.Y.S.2d 99, 101-02 (1966). In O'Connor v. Lee-Hy Paving Corp., 579 F.2d 194 (2d Cir.), *cert. denied,* 439 U.S. 1034 (1978), the court held that *Seider*-type attachment was not invalidated by *Shaffer* because the obligation to pay insurance was not unrelated to the cause of action. 579 F.2d at 197-202.

[64] 444 U.S. at 327-33. In World-Wide Volkswagon Corp. v. Woodson, 440 U.S. 286 (1980), decided on the same day as *Rush,* the Court held that a New York defendant who sold automobiles capable of use in Oklahoma did not have sufficient contacts with Oklahoma to fall within the jurisdiction of the Oklahoma courts in a products liability case. *Id.* at 299, *noted in* 51 MISS. L.J. 121 (1981).

II. JURISDICTION IN DOMESTIC RELATIONS CASES

Pennoyer v. Neff[65] explicitly stated that state courts had the right to grant a divorce to a domiciliary even when the other spouse was absent from the forum.[66] The exercise of this right, however, was severely restricted by the Supreme Court's decision in *Haddock v. Haddock*.[67] There the Court held that an ex parte divorce decree granted in a state other than the state of matrimonial domicile was not constitutionally entitled to full faith and credit in other states. *Haddock* left to each state the decision of whether such a decree would be enforceable within its borders.[68]

Haddock was overruled by *Williams v. North Carolina* (*Williams I*).[69] The Court in *Williams I* concluded that even when one spouse was absent from the forum, the state's high interest in the marital status of its domiciliaries justified the state court's exercise of jurisdiction.[70] The Court conditioned its holding, however, by requiring substituted service of process on the absent spouse sufficient to meet due process standards.[71]

In reaching its decision, the Court had difficulty characterizing the nature of the proceeding. Although it expressly rejected the view that a divorce action is an in rem proceeding, the Court reasoned that divorce is not an in personam proceeding either, since, unlike other in personam actions, the plaintiff's domicile in the forum is required to obtain jurisdiction.[72] In dissent, Mr. Justice Jackson complained that, despite the Court's refusal to classify divorce as an in rem action, the majority's holding seemed to be based on the idea that the marital *res* follows a spouse from state to state.[73]

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[65] 95 U.S. 714 (1877).

[66] *Id.* at 735. The Court reasoned that if the rule were otherwise, a spouse would often be left without a remedy for breach of the marital contract. This situation would arise, for example, when a spouse is guilty of desertion and is no longer present within the forum. *Id.*

[67] 201 U.S. 562 (1906).

[68] *Id.* at 605-06. The U.S. CONST. art. IV, § 1 provides that "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State." A sister state is required to recognize the judgment of another state only if it is a valid judgment. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 93 (1971).

[69] 317 U.S. 287 (1942). The Williams obtained ex parte divorces in Nevada from their spouses, both of whom resided in North Carolina. They then married each other and returned to North Carolina where they were convicted of bigamy. The state contended that since neither of the defendants to the divorce actions were personally served and since they did not make a general appearance, the divorce decrees were invalid in North Carolina. *Id.* at 289-90.

[70] *Id.* at 298-99. The Court noted in particular the state's interest in preventing polygamous marriages and protecting innocent children from being considered illegitimate. *Id.* at 303.

[71] *Id.* at 299. Substituted service is sufficient to meet the requirements of due process if it is reasonably calculated to give the defendant actual notice of the proceedings and an opportunity to be heard. Milliken v. Meyer, 311 U.S. 457, 463 (1940).

In later cases, the Court developed the divisible divorce doctrine, which allows a court to grant a divorce without obtaining in personam jurisdiction over the defendant spouse, but requires a court to obtain in personam jurisdiction over the defendant before adjudicating issues affecting his property interests.[74] Although the Court in *Williams I* expressly rejected the theory that a divorce action is a proceeding in rem,[75] the divisible divorce doctrine has precisely this effect, since it allows a court to assert jurisdiction over the marital status, as if it were a *res,* without obtaining in personam jurisdiction.[76] Apparently, the Court's rationale is that a divorce affects only a status and does not involve any personal rights of the defendant.[77] Several state courts have been more candid and have expressly designated divorce actions as proceedings in rem.[78]

The divisible divorce doctrine first emerged in *Estin v. Estin.*[79] There the Court held that although a Nevada court could grant Estin a divorce from his wife, it could not determine his wife's rights to alimony without obtaining in personam jurisdiction over her.[80] In *May v.*

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[72] 317 U.S. at 297.

[73] *Id.* at 316 (Jackson, J., dissenting). In Williams v. North Carolina, 325 U.S. 226 (1944) (Williams II), the Court held that the finding of domicile upon which the court's jurisdiction was based could be challenged in a subsequent proceeding. *Id.* at 232.

Sherrer v. Sherrer, 334 U.S. 343 (1948), limited subsequent relitigation to ex parte divorces by holding that a person who was a party to the first proceeding could not collaterally attack the finding of jurisdiction in a subsequent proceeding. *Id.* at 349-52.

Johnson v. Muelberger, 340 U.S. 581 (1951), held that a third party could not attack the jurisdictional finding unless the law of the state where the divorce was granted permitted such an attack. *Id.* at 586.

[74] *See, e.g.,* Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957) (state court cannot adjudicate wife's right to alimony without in personam jurisdiction over her); Estin v. Estin, 334 U.S. 541, 548-49 (1948) (same).

[75] 317 U.S. at 297.

[76] *See* H. CLARK, LAW OF DOMESTIC RELATIONS 316 (1968) (Supreme Court has adhered to in rem-in personam distinction in divorce cases).

[77] *See* Estin v. Estin, 334 U.S. 541, 546-49 (1948) (when personal rights affected, in personam jurisdiction necessary).

[78] *See, e.g.,* Wood v. Wood, 100 Idaho 387, 597 P.2d 1077, 1079 (1979) (divorce is action in rem); Comisky v. Comisky, 597 S.W.2d 6, 8-9 (Tex. Civ. App. 1980) (same).

[79] 334 U.S. 541 (1948).

[80] *Id.* at 546-49. The Nevada divorce decree made no provision for alimony, although under a prior New York separation decree, Joseph Estin was obligated to pay alimony. *Id.* at 542-43. The Court found that Nevada could properly assert jurisdiction

Anderson[81] the Court extended the divisible divorce doctrine to cases involving child custody.[82] A Wisconsin court granted a divorce decree and, without obtaining in personam jurisdiction over the mother, awarded custody of the couple's children to the father.[83] The Supreme Court invalidated the custody decree, reasoning that since a mother's personal right to custody is even more important than the alimony right discussed in *Estin,* it should be accorded equal protection.[84]

In *Shaffer v. Heitner,*[85] the Court stated in dictum that the divisible divorce doctrine *may* be consistent with *International Shoe's* standard of fairness.[86] Since *Shaffer,* however, the Court has not reconsidered the constitutionality of the divisible divorce doctrine. Moreover, with one exception,[87] state court decisions after *Shaffer* have continued to treat divorce actions as in rem proceedings without discussing *International Shoe's* standards.[88] The exception was *In re Rinderknecht,*[89] a decision by the Court of Appeals for the First District of Indiana,[90] which reexamined the divisible divorce doctrine in light of *Shaffer.*[91] Although noting that *Shaffer* required the application of *International*

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to grant the divorce because of the state's high interest in the marital status of its domiciliaries. *Id.* at 546-47 (citing Williams v. North Carolina, 317 U.S. 287, 298-99 (1942)). Nevada could not, however, determine the personal right of the defendant to receive alimony payments without first obtaining in personam jurisdiction over her. 334 U.S. at 548-49.

The Supreme Court reaffirmed *Estin* in Vanderbilt v. Vanderbilt, 354 U.S. 416, 417-18 (1957), which differed from *Estin* only in the fact that the wife's right to alimony had not been adjudicated prior to the divorce. *Id.* at 418.

[81] 345 U.S. 528 (1953).

[82] *Id.* at 528-35.

[83] *Id.* at 530-31.

[84] *Id.* at 533-34 (discussing Estin v. Estin, 334 U.S. 541, 548-49 (1948)).

[85] 433 U.S. 186 (1977).

[86] *Id.* at 208 n.30, *quoted at* note 50 *supra.*

[87] *In re* Rinderknecht, 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[88] *E.g.,* Wood v. Wood, 100 Idaho 387, 579 P.2d 1077, 1079 (1979) (in personam jurisdiction unnecessary to dissolve marriage); Pitrowski v. Pitrowski, 97 Misc. 2d 755, 412 N.Y.S. 2d 316, 318-19 (Sup. Ct. 1979) (in rem jurisdiction over marital status); Butler v. Butler, 577 S.W.2d 501, 505 (Tex. Civ. App. 1978) (in personam jurisdiction unnecessary for divorce). *But cf.* Carr v. Carr, 46 N.Y.2d 270, 273, 385 N.E.2d 1234, 1236, 413 N.Y.S.2d 305, 307 (1978) (marital *res* cannot be used for jurisdiction after one spouse dies).

In a case involving the validity of an exercise of in personam jurisdiction in an action for child support, the Mississippi Supreme Court indicated that it too considers a divorce proceeding an in rem action. Fliter v. Fliter, 383 So. 2d 1084, 1087 (Miss. 1980).

[89] 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[90] *Id.* at 1133-36.

[91] *Id.* at 1135.

Shoe's minimum contacts test to all assertions of state court jurisdiction, the court reasoned that a different level of contacts might be sufficient when an action affects only marital status.[92] It concluded that since the state had a high interest in the marital status of its domiciliaries, the residency of only one of the parties in the forum state met the minimum contacts requirement.[93] Thus, the *Rinderknecht* court, although purporting to apply the minimum contacts standard, reached essentially the same conclusion that other state courts have reached without applying the standard.[94]

III. APPLYING *International Shoe* TO DIVORCE ACTIONS: THE RATIONALE

There are basically two lines of reasoning that could lead a court to conclude that the minimum contacts standard does not apply to actions affecting only the marital status. First, a court could reason that the presence of one spouse within the forum makes the marriage itself present within the forum. Assuming that a court has power over all things tangible or intangible that are present within its sovereign territory, it follows that a court has power over the marital status and thus can properly assert jurisdiction to dissolve that status.[95]

There are two fundamental errors in this line of reasoning. First, the territorial sovereignty theory of jurisdiction derived from *Pennoyer*,[96] which this argument assumes, is no longer viable. After *International Shoe* and *Shaffer* it is clear that neither the mere presence within nor absence from a forum of a person or thing is determinative of the jurisdictional question.[97] Second, even if the *Pennoyer* doctrine of territorial jurisdiction were still viable, it is questionable whether marital status is a thing, that can be present within a geographical territory. Since a marriage is not a tangible thing it is as nonsensical to attempt to locate a marriage spatially, by asking "where is the marital *res*?," as it is to ask, "how much does the marriage weigh?"[98] A marriage does not have any sort of existence, tangible or intangible, independent of the parties to the relationship.[99] Like the words "debt" and "ownership," the word "marriage" is in fact a shorthand way of referring to a number of legal rights and duties two persons have with respect to each other and with respect to third parties.[100] A marriage itself, thought of as something other than these rights and duties, is simply nonexistent. Although some state courts perhaps are still influenced by *Pennoyer's* concepts, it is unlikely a modern state court would expressly rely on a presence theory to justify its assertion of jurisdiction in a divorce action.[101] There is a second argument that is more likely to be employed today. The minimum contacts standard is only applicable when personal rights of the defendant are involved. By denoting a divorce action as a proceeding in rem, some courts have concluded that such actions affect only the status itself, and do not affect personal rights of the defendant.[102]

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[92] *Id.* The Court reasoned that *Shaffer* had stated that divorce actions were among the in rem proceedings unaffected by its holding. *Id.* (citing Shaffer v. Heitner, 433 U.S. 186, 208 (1977)).

[93] 367 N.E.2d at 1135. The court quoted from the Supreme Court's opinion in Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I), which held that North Carolina's high interest in the marital status of its domiciliaries justified the state's exercise of jurisdiction in a divorce action without in personam jurisdiction over one of the parties. 367 N.E.2d at 1135.

[94] *See* cases cited at note 88 *supra.*

[95] This is the rationale implicitly employed by the courts that classify divorce actions as in rem proceedings. *See* cases cited at notes 78 and 88 *supra.*

[96] *See* notes 14 through 18 and accompanying text *supra.*

[97] *See* Shaffer v. Heitner, 433 U.S. 186, 206 (1977) (*Pennoyer's* foundation not secure); International Shoe v. Washington, 326 U.S. 310, 316-17 (1945) (presence within forum not real issue).

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[98] The logical problems encountered in treating the marital status as a *res* were noted by Justice Jackson in his dissenting opinion in Williams v. North Carolina, 317 U.S. 287 (1942) (Williams I). For instance, why could the marital *res* not be located where the defendant rather than the plaintiff resides? Or, perhaps it could be located where each of the parties reside, giving one state the power to dissolve half the marriage, while the other state could uphold the validity of the other half. These types of dilemmas demonstrate the artificial nature of considering the marital status as a *res*, according to Justice Jackson. *Id.* at 316-17 (Jackson, J., dissenting).

[99] Confusion often results from a failure to pay careful attention to the function a word serves. If considering a marriage to be a thing served some useful function there would then be justification for this fiction. The *res* fiction in this context does nothing, however, except to promote unclear thinking and to divert the court's attention from important considerations. *See id.* at 317 (Jackson, J., dissenting) (thinking of marriage as a piece of land promotes unclear thinking).

[100] Justice Jackson defined marriage as follows:

> It might be more helpful to think of marriage as just marriage—a relationship out of which spring duties to both spouse and society and from which are derived rights,—such as the right to society and services and to conjugal love and affection—rights which generally prove to be either priceless or worthless, but which none the less the law sometimes attempts to evaluate . . . .

Id.

[101] Writing in 1965, Professor Hazard noted that the conceptual structure established by *Pennoyer* remained substantially intact. Hazard, *supra* note 9, at 241. Considering *Pennoyer's* dominance in legal thinking for almost a century, it is understandable that many courts are still unable to break free from its hold.

[102] *See, e.g.*, Ferrari v. Ferrari, 585 S.W.2d 546, 547-48 (Mo. Ct. App. 1979) (must have jurisdiction in personam to adjudicate economic aspects of marriage but not to ad-

The central flaw in this reasoning is that proceedings in rem do affect the personal rights of the defendant. This has long been recognized by some of the most respected legal commentators. Professor Hohfeld noted the error of understanding a proceeding in rem to be an action against a thing.[103] As Hohfeld stated, a person can sustain several types of physical relationships with a thing, but the only types of relationships that have legal significance are relationships between persons, since the purpose of the law is to regulate conduct between human beings.[104] Justice Holmes expressed the same view in *Tyler v. Court of Registration*[105] when he stated: "All proceedings, like all rights, are really against persons. Whether they are proceedings or rights in rem depends upon the number of persons affected."[106]

The argument that actions affecting status do not affect personal rights is not only illogical, it is also inconsistent with the line of reasoning adopted by the Supreme Court in *Shaffer v. Heitner*[107] and *May v. Anderson.*[108] In *Shaffer* the Court made it clear that "jurisdiction over a thing" is in fact shorthand for "jurisdiction over the interests of a person in a thing."[109] In *May,* the Court recognized that there are personal rights arising out of the parent-child relationship that are entitled to *International Shoe's* protection.[110] Equally important rights arise out of the marital relationship, and they are equally entitled to protection.[111]

Since each argument advanced to justify a court's granting a divorce when the requisite minimum contacts are lacking fails, only one

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judicate status issues).

[103] W. Hohfeld, Fundamental Legal Conceptions 74-76 (1923).

[104] *Id.* at 75.

[105] 175 Mass. 71 (1900).

[106] *Id.* at 76.

[107] 433 U.S. 186 (1977).

[108] 345 U.S. 528 (1953).

[109] 433 U.S. at 207.

[110] 345 U.S. at 534.

[111] Decisions allowing a court to take jurisdiction to dissolve a marriage in the absence of in personam jurisdiction appear to be oblivious to these rights. As Justice Jackson stated, "settled family relationships may be destroyed by a procedure that we would not recognize if the suit were one to collect a grocery bill." Williams v. North Carolina, 317 U.S. at 316 (Jackson, J., dissenting).

Justice Frankfurter, dissenting in *Vanderbilt,* could find no basis for distinguishing between property rights and the rights persons have in the marital relationship. He noted that "both situations involve the adjudication of valuable rights of an absent spouse." Vanderbilt v. Vanderbilt, 354 U.S. 416, 424 (1957). Anomalously, he concluded that full faith and credit should be extended to both divorce and alimony decrees, even in the absence of in personam jurisdiction. *Id.* at 425.

conclusion can be drawn: *International Shoe* standards must be applied to actions affecting marital status.[112] Judge Traynor, writing more than twenty years ago,[113] excellently summarized the argument for this position, stating:

> We are driven to question the reality of traditional jargon about in rem and in personam jurisdiction in these aggravated clinical cases where we deal with the fictional res of status. What could be more personal than the intimate marital or parental relationship? Whatever the historical explanation of their reification as a means of circumventing *Pennoyer v. Neff* while purporting to respect it, the time has come to slough off the ritualistic classifications through which judges still feel bound to think their hard way to realistic decisions.
>
> Why should they not be free to consider jurisdiction at the outset in the complex of the parties' contacts with forum states, the interests of the state concerned in the outcome, and a pervading concept of fair play to all parties?[114]

IV. APPLYING *International Shoe* TO DIVORCE ACTIONS: THE EFFECT

As previously noted, the court in *In re Rinderknecht*[115] concluded that *Shaffer* mandated the application of *International Shoe's* minimum contacts requirement to divorce actions, but held that the domicile of a plaintiff spouse within the state was sufficient to meet that requirement.[116] The decision thus calls into question the level of contacts that are necessary to meet the standard of fairness essential for jurisdiction in a divorce action. Considered against this standard, the *Rinderknecht* opinion was incorrectly decided. This point is illustrated by the following hypothetical situation: After their marriage, a couple reside as husband and wife in Mississippi. Marital problems arise and one spouse moves to Nevada, establishes domicile by residing there for six weeks,[117] and files for divorce in a Nevada court. The other spouse has had no contacts whatsoever with Nevada.

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[112] *Accord,* Comment, *State Court Jurisdiction After Shaffer v. Heitner: The Lingering Problems,* 15 WILLAMETTE L. REV. 281, 302 (1979) (*Shaffer* requires that *Williams I* be overruled).

It might be argued that divorce actions are exempted from *International Shoe's* criteria by footnote 30 of the Court's opinion in *Shaffer* which states, "We do not suggest that jurisdictional doctrines other than those discussed in text, such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." 433 U.S. at 208 n.30. This footnote, however, does not provide an exemption. Rather, it places such actions in a category with other in rem actions which the Court noted *might* not be affected by its holding. *Id.* at 207. Nor does the Court's footnote imply that actions affecting marital status will always meet the standard of fairness; it merely suggests that in some instances such actions may not be inconsistent with that standard.

[113] Traynor, *supra* note 38, at 661.

[114] *Id.* at 660 (footnotes omitted).

[115] 367 N.E.2d 1128 (Ind. Ct. App. 1977).

[116] *Id.* at 1134-35, *discussed at* notes 89 through 94 and accompanying text *supra.*

In this situation, there are several reasons why the Nevada court cannot properly assert jurisdicion to grant the divorce. The defendant has taken no action which can be construed as purposely availing himself of the benefits and protection of Nevada's laws.[118] In fact, with respect to the marital relationship,[119] the only laws the defendant has sought protection under are the laws of Mississippi. *Kulko* establishes that the plaintiff's unilateral decision to move to Nevada is not sufficient to charge the defendant with contacts with the forum.[120]

The justification most often given for allowing a court to assert jurisdiction to grant a divorce when the defendant has no contacts with the forum state is the state's high interest in the marital status of its domiciliaries.[121] Even if it is assumed that Nevada could develop such an interest in the marital status of one who has resided in the state for only six weeks, this does not justify the court's asserting jurisdiction, since the Supreme Court explicitly stated in *Kulko* that a state's interest in the litigation is insufficient, standing alone, to meet the standard of fairness.[122]

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[117] *See* NEV. REV. STAT. § 125.020 (1979) (six week residency requirement for divorce action).

[118] *See* Hanson v. Denckla, 357 U.S. at 253 (defendant must purposely avail himself of benefits and protection of laws of forum state). One commentator proposed that when a person enters a marriage with the knowledge that the other spouse might establish domicile in another state, that person impliedly avails himself of the benefits of the laws of the states in which the other spouse may subsequently become domiciled. Seidelson, *Interest Analysis and Divorce Actions,* 21 BUFFALO L. REV. 315, 321 (1972). The commentator admits, however, that this is not a satisfactory rationale, and proposes an alternative justification for imposing jurisdiction over the nonresident defendant. *Id.* He suggests that the state of the plaintiff's domicile be considered an appropriate forum if constructive service meeting due process requirements is made. *Id.* at 325. The commentator believes there is no basis for the restrictions imposed by *Hanson* and that courts should be able to decide cases in spite of them. *Id.* at 327-29. In essence, he advocates that, at least in this context, *Hanson* be overruled. That the Supreme Court is neither inclined to overrule *Hanson* nor to relax the restrictions upon state court jurisdiction is evident from Kulko v. California Super. Ct., 436 U.S. 84 (1978). *See* notes 53 through 59 and accompanying text *supra.*

[119] *See* Shaffer v. Heitner, 433 U.S. at 209 (consider relationship between forum and litigation).

[120] Kulko v. California Super. Ct., 436 U.S. at 93-94.

[121] *See, e.g.,* Williams v. North Carolina, 317 U.S. at 298-99 (state's interest in preventing polygamous marriages and protecting innocent children); *In re* Rinderknecht, 367 N.E.2d at 1135 (state's high interest made plaintiff's domicile sufficient contact); Traynor, *supra* note 38, at 661 (state's interest in orderly resolution of domiciliary's marital status).

Another consideration is the fairness to the defendant of allowing the Nevada court to consider the divorce action. Since it was the plaintiff who chose to leave the state of matrimonial domicile, it seems more fair to require that the plaintiff return to Mississippi to bring the action.[123] It has been argued that in instances where the marital relationship is only nominal, it is not fair to require the plaintiff spouse to leave his domiciliary state to obtain a divorce, since the defendant has no real interest in preserving the marriage.[124] Conceding that this is sometimes the case, there often will be instances when the defendant does wish to preserve the marital relationship. In these instances, the ex parte divorce works a hardship upon the defendant.[125]

V. Conclusion

The divisible divorce doctrine represents a last bastion of the *Pennoyer* system.[126] The demise of *Pennoyer* should be made complete by the overruling of *Williams v. North Carolina*[127] (*Williams I*) and the application of the minimum contacts standard to all aspects of divorce proceedings. When this standard is applied to divorce actions, the domicile of the plaintiff in the forum state should not be considered as a sufficient basis for the proper assertion of jurisdiction, but rather courts should examine the defendant's relationship to the forum state to see if it is sufficient to meet the standards of *International Shoe* and its progeny.

L. Keith Parsons

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[122] 436 U.S. at 98.

[123] *Cf.* note 59 and accompanying text *supra.*

[124] *See* Traynor, *supra* note 38, at 661 (defendant's purposeless interest outweighed by plaintiff's interest in freedom); Comment, *supra* note 112, at 303 n.111 (might be proper to assert jurisdiction where marriage is dead).

[125] In Hutchinson v. Chase & Gilbert, Inc., 45 F.2d 139 (2d Cir. 1930), Judge Learned Hand noted that jurisdictional questions often involve a practical weighing of the inconveniences involved. *Id.* at 141.

[126] Another legacy of the *Pennoyer* era, *Seider*-type jurisdiction, continued to be employed until the Supreme Court's decision in Rush v. Savchuk, 444 U.S. 320 (1980), *discussed at* notes 60 through 64 and accompanying text *supra.*

[127] 317 U.S. 287 (1942), *discussed at* notes 68 through 70 and accompanying text *supra.*

FOREIGN INVESTMENTS IN MISSISSIPPI: AN ARGUMENT FOR LENIENCY

The increase in foreign investment[1] in Mississippi[2] has caused a xenophobic response,[3] as indicated by a recent flurry of legislative proposals to restrict nonresident alien investors.[4] Less than .3% of land in Mississippi is owned by foreign investors.[5] Of the 84,846 acres of foreign-owned Mississippi land,[6] less than one-third of the land is in the Mississippi Delta.[7] Despite the small percentage of foreign ownership in the state, an understanding of the ramifications of foreign investment in light of the present Mississippi law[8] is needed in order to establish a cohesive state policy toward foreign investors.

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[1] Foreign investors spent $11.53 billion in the United States in 1979. Of that total, $1.48 billion was spent on real estate. Wall St. J., Feb. 3, 1981, at 17, col. 4. For the purposes of this article, the term foreign investment refers to real estate purchases, especially of agricultural land. Conversely, the term foreign direct investment is defined as the control of the operation of an American company by a foreign entity. The control occurs through ownership of corporate stock, creation of an American subsidiary, or through a joint venture. Note, *An Evaluation of the Need for Further Statutory Controls on Foreign Direct Investment in the United States,* 8 VAND. J. TRANSNAT'L L. 145, 145 (1974).

[2] Foreign purchasers acquired 12,165 acres of agricultural land in Mississippi between February 2, 1979 and February 1, 1980. The estimated value of this land was $14,726,000. ECONOMICS AND STATISTICS SERVICE, U.S. DEP'T OF AGRICULTURE, BULL. NO. 440, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND 21 (1980).

[3] Xenophobia is defined as an unreasonable fear of foreigners. N. WEBSTER, NEW WORLD DICTIONARY 1644 (2d ed. 1970). Xenophobic reaction by a state is not a new phenomenon. *See* Sullivan, *Alien Land Laws: A Reevaluation,* 36 TEMP. L.Q. 15, 30-32 (1962) (prior state laws curtailing alien land ownership).

[4] H.B. 58, 59, 60, 61, 62 & 106, 1980 Miss. Leg., Reg. Sess.; H.B. 529 & 531, 1981 Miss. Leg., Reg. Sess. *See* notes 48 through 52 and accompanying text *infra.*

[5] BULL. NO. 440, *supra* note 2, at 5. Mississippi has a total area of 30,269,000 acres, of which 26,629,000 acres are privately owned agricultural land. Of the latter total, 84,846 acres are foreign-owned. Eighteen states, including Tennessee, Alabama, Georgia, and Florida, rank above Mississippi in percentage of foreign-owned agricultural land. *Id.* There are 20,780 acres of foreign-owned forest and nonagricultural holdings in Mississippi. *Id.* at 16.

[6] *Id.* at 5.

[7] Delta Democrat Times (Greenville, Miss.), Feb. 16, 1981, at 1, col. 1-2. The Greenville newspaper reported that 23,400 acres of mid-Delta farmland are held by foreign investors who lease most of the land back to Mississippi farmers. The investor improves the land, and it goes back to the local farmer in better condition than it was in before the purchase. The chief investors are Europeans interested in woodland. *Id.* Between Feb. 2, 1979 and Feb. 1, 1980, 594 acres of forest and nonagricultural land were purchased in Mississippi by foreigners. The estimated value of this land was $397,000. BULL. No. 440, *supra* note 2, at 30.

Land, especially farm land, has sociological and political aspects[9] which make foreign acquisition of real estate a particularly sensitive topic.[10] Regulation of property ownership traditionally has been left with the states.[11] However, any state statute regarding alien investment is subject to constitutional scrutiny[12] as well as to treaty preemption.[13] This article examines the present trend in foreign investment and the state of the law relating to alien investors with emphasis on Mississippi law regarding alien ownership of land.

I. THE INCREASE IN FOREIGN INVESTMENT

A. *Reasons for the Increase*

As a new nation, the United States welcomed foreign capital to develop industry.[14] As the country grew economically, however, America became an exporter of capital and established its international presence through large multinational corporations.[15] Recently, state governments, as well as the federal government, have encouraged a resurgence of foreign investment within their borders.[16]

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[8] *See* MISS. CODE ANN. § 89-1-23 (1972) (rights of resident and nonresident aliens holding land); *id.* § 29-1-75 (nonresident alien prohibited from purchasing public land); *id.* § 11-39-1 (quo warranto proceeding for illegal holding of land by nonresident alien); notes 183 through 218 and accompanying text *infra.*

[9] *See* Gaffney, *Social and Economic Impacts of Foreign Investment in United States Land,* 17 NAT. RESOURCES J. 377, 385 (1977) (landowners are political caste who provide needed social and public leadership); Morrison, *Limitations on Alien Investment in American Real Estate,* 60 MINN. L. REV. 621, 621 (1976) (acquisition of frontier land played important historical role in advancement of democracy in United States).

[10] *See, e.g., The Foreign Land-Grab Scare,* TIME, Jan. 8, 1979, at 40 (reports of "carpetbagging" foreigners buying United States farmland upsetting to American farmers).

[11] Hauenstein v. Lynham, 100 U.S. 483, 484 (1880).

[12] *See* notes 78 through 134 and accompanying text *infra.*

[13] *See* notes 152 through 173 and accompanying text *infra.*

[14] Note, *State Regulation of Foreign Investment,* 9 CORNELL INT'L L.J. 82, 82 (1975).

[15] *Id.* American companies with national sales plans and unique products were the first to be successful abroad. Companies such as Singer, Standard Oil, General Electric, and National Cash Register were the first international businesses. M. WILKINS, THE EMERGENCE OF MULTINATIONAL ENTERPRISE 37, 39 (1970). By the end of the 1920's, American investments abroad were triple those of foreign investors in the United States. E. KIRKLAND, A HISTORY OF AMERICAN ECONOMIC LIFE 648 (3d ed. 1951).

[16] Several states have established offices abroad to lure foreign capital. For example, Georgia, South Carolina, Virginia, Michigan, and New York have representatives in

The present American interest in foreign monies may be explained partially by the weakening dollar. As the dollar has declined in value, holders of stronger currencies such as the Japanese yen,[17] the German mark, and the Swiss franc have been able to purchase American land at bargain prices.[18] Despite the dollar slump, the United States economy is viewed favorably by foreigners who believe inflation will be controlled better here than in other countries.[19] Since United States real estate is plentifully available, improved properties in prime locations may be purchased at lower costs than similar properties offered in other countries.[20]

Another factor enhancing foreign investment in the United States involves the increased monetary reserves of OPEC countries. The reserves have stimulated investment by those seeking advantageous means to develop their wealth.[21] Also, United States tax laws give for-

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Brussels and Tokyo. Texas maintains offices in Mexico, Tokyo, and London. Alabama and North Carolina are headquartered in Switzerland. Maine and Wisconsin have located offices in Frankfurt. THE CONFERENCE BOARD, REP. NO. 625, FOREIGN INVESTMENT IN THE UNITED STATES: POLICY, PROBLEMS AND OBSTACLES 33-34 (1974).

The Nixon and Ford administrations maintained a pro-foreign investment policy. Note, *Foreign Direct Investment in United States Real Estate: Xenophobic or Principled Reaction?*, 28 U. FLA. L. REV. 491, 496 (1976). The Carter administration's policy was to remain neutral regarding foreign purchases of farmland. 19 HARV. INT'L L.J. 1026, 1030 (1978).

[17] Japanese acquisition of property centers on corporate investment and urban real estate, rather than on agricultural land. As of February 1, 1979, Japanese investors held only 3,711 acres of agricultural land in America. BULL. No. 440, *supra* note 2, at 11. Japanese investments have grown extensively in the past decade. *See* Wall St. J., Jan. 20, 1975, at 6, col. 2 (Japanese announce investments in 45 United States plants); *id.*, Oct. 29, 1975, at 4, col. 2 (Japanese some of largest holders of United States corporate securities); *id.*, Mar. 10, 1981, at 38, col. 6 (major Japanese investment in Tennessee).

[18] ECONOMICS, STATISTICS, & COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, REPORT TO THE CONGRESS, MONITORING FOREIGN OWNERSHIP OF U.S. REAL ESTATE 3 (1980) [hereinafter cited as MONITORING].

[19] Roulac, *Advising Foreign Investors in U.S. Real Estate,* 9 REAL EST. L.J. 108, 111 (1980).

[20] *Id.* Services in the United States that evaluate, manage, finance, and develop real estate make the market appealing to foreign investors. Further, foreigners find the availability of nonrecourse financing appealing. *Id.* at 112.

The difference availability makes in land prices is illustrated in this example: In 1974, in downtown Los Angeles, property sold for $50 a square foot, while similar land in Tokyo cost $900 a square foot. Wall St. J., Mar. 5, 1974, at 1, col. 6.

[21] 12 CASE W. RES. J. INT'L L. 231, 233 (1980). In the usual case, OPEC countries have not invested in American real estate. There primary interest centers on purchase of corporate securities. These have been, however, isolated purchases of real estate. For example, Kuwait invested $10 million in an Atlanta mall-hotel and also purchased Kiwah Island, 15 miles north of Charleston, South Carolina. Iran bought 642 Fifth Ave-

eigners favorable treatment.[22] Although Congress recently enacted legislation that taxes foreign investors' gains or losses from the disposition of certain properties,[23] this legislation is not likely to curtail foreigners, since its impact may be minimized by proper investment guidance.

In addition to economic benefits, the United States' democratic government presents political stability and freedom from government controls. Purchasers value the increased probabilities that their investments will not be subject to political unrest or acts of terrorism.[24] Additional incentives for foreign investors are provided by an efficient labor force and the leadership of the United States in marketing and management.[25]

B. American Fears

Except for Maine,[26] foreign acquisitions are concentrated in the South, with thirty percent of the foreign-owned agricultural land located in Alabama, Florida, Georgia, North Carolina, South Carolina, Tennessee, and Texas.[27] The United Kingdom, Luxembourg, Canada,

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nue, in New York City. N.Y. Times, Sept. 7, 1974, at 1, col. 6.

[22] The investment of a nonresident alien individual or a foreign corporation is not subject to taxation when the investment is not effectively connected with the conduct of a trade or business within the United States by such individual or corporation. I.R.C. §§ 871(b), 882(a). See, however, note 23, *infra,* for recent legislation that modifies this exemption.

[23] Foreign Investment in Real Property Tax Act of 1980, Pub.L. No. 96-499, § 1122, 94 Stat. 2682-87 (codified at I.R.C. § 897). This Act provides that gain or loss from the disposition of a "United States real property interest" shall be taxed under I.R.C. §§ 871(b)(1) or 82(a)(1) as if the nonresident alien individual or foreign corporation were engaged in a trade or business within the United States and the "property interest" were effectively connected with such trade or business. A "United States real property interest" is an interest in real property located in the United States or an interest (other than an interest solely as a creditor) in certain domestic corporations that own an interest in real property located in the United States. These provisions of this Act are effective for dispositions after June 18, 1980.

[24] *See The Selling of America,* TIME, May 29, 1978, at 70 (United States offers foreign investors economic and political stability); MONITORING, *supra* note 18, at 3 (foreign investors feel United States real estate investment provides protection from political and economic problems at home).

[25] 12 CASE W. RES. J. INT'L L., *supra* note 22, at 232-33; Roulac, *supra* note 19, at 112.

[26] Approximately five percent of the total acreage in Maine is foreign-owned. One timber firm, however, holds approximately 80% of this total. BULL. No. 440, *supra* note 2, at 6.

[27] *Id.* at 5. The 1,717,006 acres of foreign holdings in the South are divided as follows: Alabama, 163,498; Florida, 202,101; Georgia, 257,309; North Carolina, 152,096; South Carolina, 240,437; Tennessee, 287,855; and Texas, 413,710. *Id.* As of February 1,

West Germany, the Netherlands, and the Netherlands Antilles lead as the major investors in United States agricultural land, accounting for eighty-one percent of the investments.[28] Although more individuals are reported owners of the land, foreign corporations own larger acreages.[29]

Foreign farmland purchases have raised concerns over economic consequences and use of the land,[30] but the fear that land prices will rise due to foreign investment seems in large part unjustified.[31] For instance, Georgia and Tennessee have very high rates of foreign investment, but the increases in land prices in those states since 1973 have been average or below-average.[32] Because the real estate market is relatively unrestricted, foreign purchasers have little reason to pay high prices[33] unless they are seeking a particular type, location, or quality of land.[34]

1980, total foreign ownership of United States agricultural land was 5.6 million acres, or slightly less than 0.5%. *Id.* at 1.

The preference for agricultural land, rather than urban real estate, may be explained by a growing sensitivity to worldwide food shortages. F. MORRISON & K. KRAUSE, STATE AND FEDERAL LEGAL REGULATION OF ALIEN AND CORPORATE LAND OWNERSHIP AND FARM OPERATION 23 (U.S. DEPT. OF AGRICULTURE, AGRICULTURAL ECONOMIC REPORT NO. 284 (1975)).

[28] BULL. No. 440, *supra* note 2, at iii. Forest land holdings represent 50% of foreign-owned agricultural land, while cropland, pasture, and other agricultural land represent 45% of foreign-owned holdings. A small percentage of foreign-owned agricultural land is comprised of orchards and vineyards. *Id.* at 13.

[29] ECONOMICS, STATISTICS AND COOPERATIVES SERVICE, U.S. DEP'T OF AGRICULTURE, REP. NO. 447, FOREIGN OWNERSHIP OF U.S. AGRICULTURAL LAND 5 (1980). Some 1,215 individuals were reported owning 216,532 acres of land, an average of 178 acres per holder; 544 foreign corporations were reported owning some 2,346,696 acres, an average of 4,314 acres per holder. *Id.*

[30] *Id.* at 24-26. Increase in land prices, reduction in farming opportunities, and reduction in local markets are some of the fears raised by foreign ownership of American farmland. *Id.* The average price paid for agricultural land by a foreigner, however, is $610 per acre,while the national average value of farmland is $559 per acre. *Id.* at 25 n.13.

[31] *See generally* Roulac, *supra* note 19, at 113-14 (foreign real estate investments contribute to but do not establish higher United States land prices); White, *How Foreign Money Buys U.S. Real Estate,* 47 APPRAISAL J. 59, 60 (1979) (same).

[32] REP. No. 447, *supra* note 29, at 24. Kentucky, Wisconsin, and Minnesota, however, have experienced above-average increases in land prices, although the rate of foreign buying was low. *Id.*

[33] Foreign investors pay higher prices because prime real estate costs more, not because they are not discriminating buyers. Roulac, *supra* note 19, at 114. *Contra,* Zagaris, *The Agricultural Foreign Investment Disclosure Act of 1978: How Will It Affect the Market in U.S. Real Estate?,* 8 REAL EST. L.J. 3, 12 (1979) (foreign investors pay excessive prices for land, resulting in inflated prices).

[34] MONITORING, *supra* note 18, at 22.

The long-term effects of foreign land investment on income and employment vary according to whether such transactions cause increases in domestic consumption, domestic investment, savings, and imports.[35] If the money from the sale of land developed by the foreign investor[36] is put into savings or is used to import goods, the effect on income and employment is minimal.[37] However, use of the proceeds for domestic consumption leads to a short-term stimulus of the economy.[38] Alternatively, if the proceeds are used for the creation of new capital goods or development of new real estate by the foreign investor, income and employment will be permanently increased unless the new investment displaces other domestic investments.[39]

Statistics regarding use of land by foreign investors indicate that very little agricultural land has been converted to non-agricultural uses.[40] In fact, in most cases foreign owners leave not only the land, but also the operators, the same as before the purchase.[41] Moreover, concerns that American farm production suffers as a result of absentee ownership seem unfounded, since foreign investors tend to increase rather than decrease agricultural production.[42] This increase cannot be attributed to consolidations because few foreign investors consolidate small farms into larger farms.[43]

Americans also worry that communities will suffer from the tenured operation of farmland.[44] This fear is unfounded since nearly forty percent of United States farmland is leased, and almost ninety percent of that is in the hands of non-operating owners.[45] In fact, absentee landowners actually generate net income for rural counties because the foreign investor pays property taxes but does not demand county services such as schools and welfare.[46]

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[35] *Id.*

[36] Examples of development by the foreign purchaser include construction of office buildings and shopping centers. *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* Domestic displacement may occur in areas of high employment. In such areas,foreign investments are likely to displace domestic investments by outbidding for scarce labor and resources. The end result would likely be higher prices rather than true income gains. *Id.*

[40] BULL. No. 440, *supra* note 2, at 117. As of February 2, 1979, 88% of agricultural lands that were foreign-owned remained agricultural lands. *Id.*

[41] *Id.*

[42] REP. No. 447, *supra* note 29, at 26.

[43] MONITORING, *supra* note 18, at 21; REP. No. 447, *supra* note 29, at 28. Some large foreign-owned farms do exist. Sullivan, *supra* note 3, at 36. The overwhelming majority of large corporate farms, however, are American-owned. *Id.*

[44] REP. No. 447, *supra* note 29, at 24.

[45] *Id.* at 29.

C. *The Rise of State Regulatory Legislation*

State statutes regulating alien ownership of land were enacted long before the present trend of foreign investment.[47] The revitalized interest in American land, however, has prompted the introduction of state bills to curtail further foreign involvement. Recent Mississippi bills calling for strict definitions of foreign investors,[48] annual reporting of lease interests,[49] acreage restrictions,[50] corporate ownership limitations,[51] and a reduced time period for holding a lien[52] died in committee. The present Mississippi law on alien ownership totally restricts nonresident aliens, with the exception of Syrians and Lebanese, from holding land.[53] Despite this statutory prohibition, 84,846 acres of Mississippi agricultural land are owned by various foreign entities,[54] a phenomenon that, in many instances, may be explained by United States treaty considerations.[55]

An understanding of the Mississippi statute and its limitations can best be approached by comparing it with other state statutes and the history of their enactments. The various state statutes restricting alien land holdings have their origins in the adoption of English common law, which is the source of most American land law,[56] the late nineteenth century legislation in the midwest, and the anti-Japanese legislation during the early 1900's and the 1940's.[57] Under the English feudal land tenure system, foreigners were not viewed as loyal subjects of the king and his nobles and thus were excluded from direct land ownership.[58] Although England later lifted this ban against foreign property ownership,[59] the common law notions had already become a part of the British colonies. Some post-Revolution legislation removed the ownership restrictions, but most of the common law prohibitions remained.[60]

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[46] *Id.*

[47] *See* notes 71 through 75 and accompanying text *infra*. For an excellent history of alien land laws, see Sullivan, *supra* note 3, at 26-34.

[48] H.R. 529, 1981 Miss. Leg., Reg. Sess. The bill was labeled the "Foreign Investment Limitation Act of 1981" and proposed certain definitions for "foreign person" and "foreign official institution," neither of whom could own land in Mississippi. This bill was the same as H.R. 59, 1980 Miss. Leg., Reg. Sess.

[49] H.R. 531, 1981 Miss. Leg., Reg. Sess. This bill was the same as H.R. 62, 1980 Miss. Leg., Reg. Sess. Another bill, H.R. 61, 1980 Miss. Leg., Reg. Sess., proposed annual reporting by corporations and partnerships.

[50] H.R. 58, 1980 Miss. Leg., Reg. Sess. The authors of the bill sought to restrict foreign interest in land to 640 acres. *Id.*

[51] H.R. 58 & 60, 1980 Miss. Leg., Reg. Sess. The former bill called for at least 50% American ownership of the outstanding stock in any corporation. The latter proposed that 60% of such stock be American-owned. *Id.*

[52] H.R. 106, 1980 Miss. Leg., Reg. Sess. The bill proposed a deletion of the Syrian and Lebanese exemption as well as a monitoring system to ensure that nonresident aliens did not hold liens for more than three years. *Id.*

[53] MISS. CODE ANN. § 89-1-23 (1972); *see* notes 183 through 190 and accompanying text *infra*.

[54] *See* note 5 *supra*.

[55] *See* notes 156 through 162 and accompanying text *infra*.

[56] Allen & Olaussen, *Problem Areas Concerning Foreign Investment in U.S. Real*

The movement of immigrant farmers into the midwestern states in the late 1800's caused the creation of more statutory restrictions on property ownership.[61] Only immigrants who intended to become United States citizens were allowed to own land.[62] As with the pre-Revolution law, the legislation remained after the reason for the initial enactment had ceased to exist.[63]

In an effort to eliminate alien competition, anti-Japanese legislation appeared on the west coast in the early part of the twentieth century.[64] California instituted a citizenship requirement based upon the Naturalization Act of 1913, which barred Oriental persons from naturalization.[65] After California's statute was declared constitutional in 1923,[66] other states based restrictions upon an alien's ineligibility for

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Estate, 2 NW. J. INT'L L. BUS. 1, 1-3 (1980); Fisch, *State Regulation of Alien Land Ownership,* 43 MO. L. REV. 407, 408-09 (1978); Morrison, *supra* note 9, at 623.

[57] *See* Sullivan, *supra* note 3, at 29.

[58] 2 W. BLACKSTONE, COMMENTARIES *248-49.

[59] The prohibition was removed by statute. Naturalization Act, 1870, 33 & 34 Vict. c. 14, § 2.

[60] Ohio was the first state to remove completely the alien landholding restriction. 1804 OHIO LAWS 123. Sullivan notes that "actual removal of disabilities became less imperative once the capacity to remove them at will had been won. When the need seemed pressing, liberal policies were followed but where it did not the common law disabilities were retained or replaced by comparable legislation restrictions." Sullivan, *supra* note 3, at 29.

[61] Sullivan, *supra* note 3, at 30-32.

[62] Morrison, *supra* note 9, at 625. This legislation was passed in response to large purchases of land in the Western territories by British nobles. The residents feared that large purchases by foreigners would endanger the ultimate grant of statehood and create economic dependence on England. *Id.*

[63] The significance of these laws was reduced because the territories were organized into states; British interference and control, the reason behind the statutes' enactment, simply did not develop. The legislation, however, remained. *Id.*

[64] *Id.* at 626-28.

[65] *Id.* at 626.

[66] *See* Porterfield v. Webb, 263 U.S. 225, 228 (1923) (statutory discrimination against aliens based on reasonable classification).

citizenship.[67] New anti-Japanese legislation appeared during World War II,[68] but most of these racially discriminatory statutes were repealed after the war.[69] In 1952, an amendment to the Federal Immigration Law eliminated the class of "ineligible alien" from immigration laws[70] and thus, state laws based upon ineligibility of United States citizenship became meaningless.

The different origins of state legislation against aliens led to four broad categories of state statutes. These categories are: (1) statutes which are based upon the common law general prohibition;[71] (2) statutes which limit the amount and period of ownership;[72] (3) statutes which restrict ownership of land to aliens eligible for citizenship;[73] and (4) statutes which offer aliens full national treatment.[74] Restrictions on an alien's ability to inherit American land may also affect alien acquisition of land.[75]

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[67] Sullivan, *supra* note 3, at 34. Arizona, Delaware, Idaho, Kansas, Montana, Oregon, and Texas adopted similar statutes within five years of the California decision. Louisiana and New Mexico incorporated alien restrictions into their constitutions. *Id.* It is interesting to note that the xenophobia had spread to states that had practically no Japanese population. *Id.; see* KAN. STAT. § 59-511 (1939) (citizenship land ownership requirement).

[68] Sullivan, *supra* note 3, at 34. During this period, Arkansas, Utah, and Wyoming joined the ranks of states with restrictive alien laws. *Id.*

[69] *Id.* at 32-34; Morrison, *supra* note 9, at 627-28. For a specific study, see Note, *Are Oklahoma's Restrictions on Alien Ownership of Land Constitutional?*, 32 OKLA. L. REV. 144 (1979).

Any racially restrictive land laws still in existence probably would be unconstitutional. *See* Oyama v. California, 332 U.S. 633, 647 (1948) (native-born citizen of Oriental descent not subject to alien land statute). The majority in *Oyama* did not reach the question whether the restrictive alien land statute denied equal protection. *Id.* Four justices, however, in concurring opinions, questioned the constitutionality of the statute. *Id.* at 647-74; *see* notes 85, 86 and accompanying text *infra.*

[70] Immigration and Nationality Act, Pub. L. No. 82-414, § 311, 66 Stat. 239 (1952) (codified at 8 U.S.C. § 1422 (1976)). The only remaining classes of aliens ineligible for citizenship are based on national defense: (1) Those favoring a totalitarian government; (2) deserters of the armed forces; and (3) persons dismissed from armed services due to alienage. 8 U.S.C. §§ 1424-1426 (1976).

[71] Eight states allow only resident aliens to own property: CONN. GEN. STAT. ANN. § 47-57 (1958); IOWA CODE ANN. § 567.3 (Supp. 1981-82); MISS. CODE ANN. § 89-1-23 (1972); N.H. REV. STAT. ANN. § 477:20 (1968); N.J. STAT. ANN. § 46:3-18 (West Supp. 1979); OKLA. STAT. ANN. tit. 60, §§ 121-22 (1970). Alaska and Hawaii retained the federal alien land law that was in effect when statehood was granted. *See* 48 U.S.C. § 1502 (1976) (resident alien may own land). Alaska has not imposed further restrictions. Hawaii has, in addition to the incorporated federal law, restricted ownership of residental lots on Oahu to United States citizens or declarant aliens residing in the state for five years or more. HAW. REV. STAT. § 206-9 (1976); *id.* § 516-33 (Supp. 1979).

[72] *See* ILL. REV. STAT. ch. 6, §§ 1-2 (Smith-Hurd Supp. 1978) (alien's right to hold realty limited to six years or until alien reaches majority); IND. CODE ANN. § 32-1-8-1 (Burns 1979) (alien may not hold over 320 acres longer than five years or for five years past age 18); KY. REV. STAT. ANN. §§ 381.300-.320 (Baldwin 1979) (nonresident alien may hold eight years, while resident alien may hold 21 years); MO. ANN. STAT. § 442.560 (Vernon Supp. 1980) (nonresident alien may own no more than five acres of agricultural

These inconsistent state laws confuse American policymakers and alien investors alike and inhibit a cohesive foreign relations policy.[76] In addition, the lack of uniformity in land laws traps the uninformed alien and forces the financially powerful alien to disguise purchases by the use of corporations or trusts.[77] Furthermore, the statutes are subject to constitutional scrutiny and federal preemption.

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land); NEB. REV. STAT. § 76-402 (1976) (aliens may hold five years); OKLA. STAT. ANN. tit. 60, § 123 (1970) (nonresident alien may hold for only five years); PA. STAT. ANN. tit. 68, § 32 (Purdon 1965) (alien may hold only 5,000 acres); S.C. CODE § 27-13-30 (1976) (alien may not hold more than 500,000 acres) (see note 238 *infra* for the history of this provision); S.D. COMP. LAWS ANN. §§ 43-2-9, 43-2A-1, -2, -7 (Supp. 1979) (nonresident alien may not hold more than 160 acres except that acquired by devise, inheritance, or kept as debt security); WIS. STAT. ANN. §§ 710.01, .02 (West 1977) (nonresident alien may own only 640 acres).

[73] ARIZ. REV. STAT. ANN. § 33-1201 (1956); KAN. STAT. ANN. § 59-511 (1963); MINN. STAT. § 500.221(2) (Supp. 1980); OR. REV. STAT. § 517.044 (1977); WYO. STAT. § 34-15-101 (1977). Colorado and Louisiana enacted constitutional restrictions. COLO. CONST. art. II, § 27; LA. CONST. art. 19, § 20.

[74] Several states give aliens the right to hold real property on equal terms with citizens of the United States. *See, e.g.*, ALA. CODE § 35-1-1 (1975); ARK. STAT. ANN. § 50-301 (1971); TENN. CODE ANN. § 64-201 (1976). For a discussion and more complete list of states with similar statutes, see Sullivan, *supra* note 3, at 17.

Three other states allow ownership by alien subjects of governments friendly with the United States. GA. CODE ANN. § 79-303 (1973); MD. REAL PROP. CODE ANN. § 14-101 (1974); VA. CODE § 55-1 (1950).

[75] Morrison, *supra* note 9, at 637-38. In many eastern European countries during the Cold War, inheritances were virtually confiscated. Consequently, American states with large populations of first-generation immigrants from these countries passed statutes prohibiting distribution of an inheritance to a nonresident alien, absent proof that the inheritance would not be confiscated. *Id.*; *see e.g.*, N.Y. SURR. CT. PROC. ACT § 2218(3) (McKinney Supp. 1980).

As a further restriction on inheritance of land by aliens, some states require reciprocal inheritance rights. Thus, a United States citizen must be able to inherit land in the alien's country in order for the alien to inherit in the United States. *E.g.*, NEB. REV. STAT. § 4-107 (1977); WYO. STAT. § 34-15-101 (1977).

[76] *See* notes 174 through 186 and accompanying text *infra*.

[77] *See* notes 231 through 243 and accompanying text *infra*.

II. CHALLENGES TO REGULATION OF ALIEN OWNERSHIP OF LAND

A. *Equal Protection Arguments*

The fourteenth amendment mandates that no state may deny "any person within its jurisdiction the equal protection of the law."[78] Resident aliens have long been viewed as "persons" under the equal protection clause.[79] However, nonresident aliens have not been deemed to be a "discrete and insular" minority,[80] although alienage has been classified as a suspect category.[81]

Initially, resident aliens enjoyed the same rights and privileges as American citizens.[82] As the United States industrialized, however, attitudes toward aliens changed,[83] and the equal protection clause had to be used to strike down state legislation that restricted the employment opportunities of resident aliens.[84] Yet, it was not until the 1948 decision of *Takahashi v. Fish & Game Commission*[85] that the Court held that state power in restricting aliens was confined to narrow circumstances.[86]

In the 1971 case of *Graham v. Richardson,*[87] denial of welfare benefits to resident aliens was held to be unconstitutional.[88] Resident aliens are now considered a discrete and insular minority and thus "classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."[89] The protection is justified in light of the fact that aliens in the United States must pay income taxes[90] and must subject themselves to the laws of the United States.[91] This constitutional protection has been extended only "to aliens who 'work for a living in the common occupations of the community.' "[92] Therefore, nonresident aliens do not benefit from these cases.

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[78] U.S. CONST. amend. XIV, § 1.

[79] *See* Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886) (fourteenth amendment applies to all persons without regard to nationality).

[80] *See* Sugarman v. Dougall, 413 U.S. 634, 641 (1973) (protection extended to aliens working in United States); Johnson v. Eisentrager, 339 U.S. 763, 771 (1950) (protection requires lawful presence).

The concept of a "discrete and insular" class was first mentioned in United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). Justice Stone advanced the proposition that groups lacking effective political power could be afforded a higher standard of review. *Id.*

[81] *In re* Griffiths, 413 U.S. 717, 721 (1973); Sugarman v. Dougall, 413 U.S. 634, 642 (1973); Graham v. Richardson, 403 U.S. 365, 372 (1971).

[82] Comment, *Equal Protection and Supremacy Clause Limitations on State Legislation Restricting Aliens,* 1970 UTAH L. REV. 136, 136.

[83] *Id.;* Note, *Equal Protection Review of State Statutes Restricting Alien Employment,* 8 CORNELL INT'L L.J. 92, 92 (1974). The resident alien worker was greeted with open arms so long as there was enough work for citizen and alien alike. As America changed into an urbanized industrial society, however, the states adopted a more restrictive attitude toward the now undesirable alien workers. Thus, statutes were passed severely limiting jobs available to aliens. *Id.*

[84] *See* Truax v. Raich, 239 U.S. 33, 43 (1915) (Arizona anti-alien labor law unconstitutional); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (laundry permit statute applied only to aliens unconstitutional).

[85] 334 U.S. 410 (1948).

[86] *Id.* at 420. The Court invalidated a California statute which prohibited aliens from obtaining a fishing license and thereby deprived them from earning a living. *Id.*

[87] 403 U.S. 365 (1971).

A subclass of aliens, those ineligible for citizenship, has also raised equal protection arguments in the area of land ownership. Several cases were decided in 1923 by the United States Supreme Court, which upheld state statutes prohibiting aliens who were ineligible for citizenship from owning land.[93] In 1948, the Court reversed itself in *Oyama v. California*[94] and held that a landowning restriction against ineligible aliens was unconstitutional.[95]

The present equal protection doctrine provides two degrees of constitutional protection. To be constitutional, a law that affects suspect classifications or fundamental rights must meet the "higher test" of a compelling state interest.[96] In cases involving a resident alien's occupation or economic rights, courts have used strict scrutiny to declare various state laws unconstitutional.[97] Other classifications need only comply with the "lower test" of a rational relationship between the classification and its intended purpose.[98] However, before a standard of review may be applied, it is first necessary to determine whether the alien is in the class of persons entitled to present an equal protection claim.

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[88] *Id.* at 374.

[89] *Id.* at 372.

[90] I.R.C. § 871(b). *See* Treas. Reg. § 1.1-1(a) (taxation of aliens).

[91] Eisler v. United States, 170 F.2d 273, 279 (D.C. Cir. 1948).

[92] Truax v. Raich, 293 U.S. 33, 44 (1915), *quoted in* Sugarman v. Dougall, 413 U.S. 634, 641 (1973).

[93] *See* Frick v. Webb, 263 U.S. 326, 333-34 (1923) (statute prohibiting alien ownership of stock in a farm corporation upheld); Webb v. O'Brien, 263 U.S. 313, 321 (1923) (citizen could not enter contract with an alien ineligible for citizenship); Porterfield v. Webb, 263 U.S. 225, 232 (1923) (law forbidding aliens not eligible for citizenship to lease land constitutional); Terrace v. Thompson, 263 U.S. 197, 222 (1923) (statute prohibiting nondeclarant aliens' ownership of land upheld).

[94] 332 U.S. 633 (1948).

[95] *Id.* at 647.

[96] Hunter v. Erickson, 393 U.S. 385, 391-92 (1969); Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964).

[97] Nyquist v. Mauclet, 432 U.S. 1, 12 (1977) (denial of state educational financial aid to nondeclarant alien unconstitutional); Examining Bd. v. Flores de Otero, 426 U.S. 572, 601 (1976) (denial of license to practice civil engineering to alien unconstitutional); Indiana Real Estate Comm'n v. Satoskar, 417 U.S. 938, 938 (1974) (district court holding invalidating statute denying real estate licenses to aliens *aff'd mem.*) (district court deci-

Nonresident aliens have not been extended the guarantees of equal protection because they are not physically present within the state and, therefore, are not within the state's jurisdiction.[99] However, by the mere implementation of the statute's restriction, the alien is subject to the state's jurisdiction.[100] In addition, a nonresident alien with a tourist visa may make a personal appearance before an adjudicatory tribunal and thus subject himself to the state's jurisdiction.[101]

Investment motives lead to further confusion between the alienage distinctions. A resident alien's ownership of land receives equal protection status since it is viewed as a fundamental right.[102] On the other hand, a nonresident alien's interest in United States land is seen purely as an investment rather than as a source of economic survival.[103] Many states have recognized this distinction and have exempted resident aliens from the statutes' land ownership restrictions.[104] However, since the language of a statutory exemption is often broad, a resident

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sion unpublished, and 7th Circuit did not hear the case); *In re* Griffiths, 413 U.S. 717, 722 (1973) (exclusion of aliens from practice of law unconstitutional); Graham v. Richardson, 403 U.S. 365, 376 (1971) (denial of welfare benefits to aliens unconstitutional).

[98] *E.g.,* Dandridge v. Williams, 397 U.S. 471, 485 (1970) (reasonable basis); McGowan v. Maryland, 366 U.S. 420, 426 (1961) (reasonable justification); Lindsley v. National Carbolic Gas Co., 220 U.S. 61, 78 (1911) (reasonable classification).

[99] *See* Shames v. Nebraska, 323 F. Supp. 1321, 1333 (D. Neb. 1971) (nonresident alien not physically present in state).

U.S. Const. amend. XIV, § 1 provides in part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." The United States Supreme Court has not yet given a precise meaning to "any person within its jurisdiction." The term "within its jurisdiction" was first viewed as physical presence within the state's borders. Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886). Later, the term was construed to mean within the jurisdiction of the state's courts. Blake v. McClung, 172 U.S. 239, 261 (1898). Most recently, the *Blake* standard was modified to include one appearing before a state's courts. Kentucky Fin. Corp. v. Paramount Auto Exch. Corp., 262 U.S. 544, 549 (1923).

[100] *See* Graham v. Richardson, 403 U.S. 365, 371 (1971) (statutory creation of two classes invokes equal protection analysis).

[101] Morrison, *supra* note 9, at 642.

[102] *Id.* Land ownership is basic to economic survival; therefore, strict scrutiny should be applied to defeat state restrictions on alien land ownership. *Id.*

[103] *Id.* at 643. *See* notes 110, 111 and accompanying text *infra.*

[104] *See* note 73 and accompanying text *supra.*

alien may also purchase property to extend his investments. Therefore, a resident alien may receive equal protection for an investment which is not an economic necessity, while a nonresident foreign investor who wishes to expand financially receives no protection for his American property. At least one commentator argues for recognition of nonresident alienage as a suspect category if the nonresident has property rights in the United States or is physically present within the jurisdiction.[105]

One argument against the extension of constitutional protection to the foreign investor incorporates the over inclusive rationale that ninety percent of the world's population cannot be viewed as a suspect category.[106] Realistic property considerations indicate the fallacy of this argument. The small percentage of foreigners having property rights or being actually present with a state's jurisdiction should be offered a fundamentally fair method of property protection.[107] Both resident and nonresident aliens owning land in the United States pay property taxes.[108] In spite of this, the nonresident alien may have his property taken away and be left with no recourse in American courts.

Despite the irrational gaps in the treatment of alienage, the nonresident alien would probably not meet the suspect classification or fundamental right requirements needed for strict judicial review. Although the nonresident alien is part of a minority group, he may not be viewed as an "isolated minority" needing special judicial protection, since he has not abandoned his homeland nor given up the diplomatic support of his country as has the resident alien.[109] In addition, there is no fundamental right involved if the nonresident alien is making his purchase of United States land for financial advancement.[110] Thus a nonresident alien's attack upon restrictive legislation would be judged by the lower standard.[111] In such cases, legislation limiting or prohibiting ownership would likely be upheld, since there exists a rational relationship between the classification, the restriction of alien property possession, and the state purpose of excluding alien influence.[112]

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[105] 5 VAND. J. TRANSNAT'L L. 535, 541 (1972).

[106] *See* Comment, *Our Land Is Your Land: Ineffective State Restriction of Alien Land Ownership and the Need for Federal Legislation,* 13 J. MAR. L. REV. 679, 702 (1980) (nonresident aliens equal 90% of world's population and are not entitled to protection).

[107] *See* note 105 and accompanying text *supra.*

[108] MONITORING, *supra* note 18, at 24.

[109] Morrison, *supra* note 9, at 643.

[110] *Id.* at 642-43. It should be noted that a resident alien can argue that his purchase of land was needed for gainful employment, which has been held to be constitutionally protected. Takahashi v. Fish & Game Comm'n, 334 U.S. 410 (1948). *See* notes 85, 86 and accompanying text *supra.*

[111] Morrison, *supra* note 9, at 643.

Federal regulations are also subject to equal protection scrutiny.[113] However, federal laws limiting alien ownership of property are more likely than state laws to withstand attack because the federal government has supremacy over national matters.[114] For example, the Foreign Assets Control Regulations[115] may be used to prohibit certain nationals from owning American land. Furthermore, during a declared war, federal law provides for the regulation of property held by enemy aliens.[116] From these examples it is readily apparent that federal regulations, unlike state laws, are selective in their operation.[117]

The disparity of treatment between resident and nonresident aliens may be challenged as irrational.[118] Present cases, however, indicate that the equal protection clause would not help the nonresident alien challenging of restrictive legislation.[119] Without a fundamental right involved in his proprietary interest, the nonresident alien would not receive strict judicial review. Under the lower standard, it would be difficult to convince a court that the restriction was not rationally related to the state purpose of excluding foreign influence.

B. Due Process Challenges

The substantive due process arguments of the fourteenth amendment do not present a powerful challenge to ownership retriction laws.

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[112] *Id.*

[113] *See* Shapiro v. Thompson, 394 U.S. 618, 641 (1969) (federal statutes may not violate equal protection clause); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (constitution forbids discrimination by federal government); Morrison, *supra* note 9, at 643.

[114] *See* notes 131 through 134 and accompanying text *infra*. Two federal policies, however, were struck down as discriminatory. *See* Mow Sun Wong v. Hampton, 500 F.2d 1031, 1040-41 (9th Cir. 1974) (discrimination against aliens in federal civil service regulations unconstitutional), *aff'd.* 426 U.S. 88, 116-17 (1976); Ramos v. United States Civil Serv. Comm'n, 376 F. Supp. 361, 368 (D.P.R. 1974) (discrimination against aliens in disaster loan program unconstitutional).

[115] 31 C.F.R. §§ 500.101 through .809 (1980). Assets of citizens of the People's Republics of China, Cambodia, North Korea, and Viet Nam have been controlled under these regulations. Similar regulations limit property transactions in the United States by the governments of Cuba and Iran. 31 C.F.R. §§ 515.201 through .204 (1980); *id.* §§ 535.101 through .904.

[116] 50 U.S.C. app. § 5 (1976 & Supp. III 1979).

[117] *See* notes 131 through 134 and accompanying text *infra*. The federal government has such powers under the constitution.

[118] *See* notes 111, 112 and accompanying text *supra.*

[119] *See* notes 80, 81 and accompanying text *supra.*

Due process of the law requires a legitimate purpose for the classification, whereas equal protection examines the legitimacy of the classification itself.[120] The judicial review used in due process cases is similar to the lower standard applied in equal protection cases. Thus, due process requirements may be satisfied simply by showing a rational relationship between the law's purpose and a legitimate state interest.[121] However, due process challenges provide clarification of the purposes of laws and thus aid in their constitutional examination under other applicable tests.

The due process clause of the fourteenth amendment subjects the nonresident alien to an unsettled area of the law.[122] In *Shames v. Ne-*

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[120] Morrison, *supra* note 9, at 645.

[121] North Dakota State Bd. of Pharmacy v. Snyder's Drug Store, Inc., 414 U.S. 156, 164-67 (1973).

[122] Several cases have supported an extension of due process to nonresident aliens. *See, e.g.,* United States v. Pink, 315 U.S. 203, 228 (1942) (aliens as well as citizens entitled to protection of fifth amendment due process); Russian Vol. Fleet v. United States, 282 U.S. 481, 489 (1931) (nonresident alien's contract to build ships protected by due process clause of fifth amendment); Sardino v. Federal Reserve Bank, 361 F.2d 106, 111 (2d Cir.) (nonresident alien entitled to due process protection), *cert. denied,* 385 U.S. 898 (1966).

Other decisions have opposed the vesting of due process rights in nonresident aliens, restricting those rights instead to aliens within the territorial jurisdiction of the United States. For example, the Court in Yick Wo v. Hopkins, 118 U.S. 356 (1886), noted that the fourteenth amendment was universal in application "to all persons within the territorial jurisdiction without regard to . . . nationality." *Id.* at 369. In his concurring opinion in Bridges v. Wixon, 326 U.S. 135 (1945), Justice Murphy noted that:

> [A]n alien . . . brings with him no constitutional rights . . . . The Bill of Rights is a futile authority for the alien seeking admission for the first time to these shores. But once an alien lawfully enters and resides in this country he becomes invested with the right guaranteed by the Constitution to all people within our borders. Such rights include . . . the due process clause of the Fourteenth Amendment.

Id. at 161. Later, the Court in Johnson v. Eisentrager, 339 U.S. 763 (1950), noted that "[i]n extending constitutional protections [to aliens], the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Id.* at 771. Other courts have noted this territorial view of alien rights. For example, in a determination of whether Canadian residents commuting daily across the border to work in the United States should receive full constitutional protection, the Ninth Circuit Court of Appeals stated that "[a]ny person within the United States, citizen or alien, resident or nonresident, is protected by the guarantees of the Constitution." Sam Andrews' Sons v. Mitchell, 457 F.2d 745, 749 (9th Cir. 1972).

In sum, under the territorial concept of alien rights expressed in these cases, a nonresident landowner might, by making an appearance in the United States, assert the due process clause to resist any attempt by a state to confiscate his property under that state's restrictive alien land ownership law.

braska,[123] the district court avoided this troublesome area when asked to rule on the constitutionality of a state statute requiring certain property inherited by a nonresident alien to escheat to the state. By holding that the statute did not violate the due process clause,[124] the court did not have to address the issue whether the due process clause applies to nonresident investors.[125] The court in *Shames* echoed the earlier Supreme Court decision in *Terrace v. Thompson*,[126] a case which held that a state may bar ownership of its land by nonresidents without violating due process.[127]

C. *Compensation and Preemption*

As previously stated, a state law restricting nonresident alien ownership of land will not be invalidated by the due process clause. However, the foreign investor may receive some protection through the fourteenth amendment's incorporation of the fifth amendment, which provides compensation for the taking of property for public use.[128] Thus, an argument may be made that the state must compensate the nonresident alien if it confiscates his property.[129]

Article VI of the United States Constitution,[130] the supremacy clause, also offers an indirect constitutional limitation on state legislation regarding alien ownership of real estate. The federal government has exclusive control over foreign affairs[131] and the making of treaties, which are the "Supreme Law of the Land."[132] Since a federal law preempts a conflicting state law,[133] treaties override inconsistent state legislation.[134]

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[123] 323 F. Supp. 1321 (D. Neb. 1971).

[124] *Id.* at 1335.

[125] *Id.* at 1333.

[126] 263 U.S. 197 (1923).

[127] The *Shames* court viewed the *Terrace* holding as controlling precedent on the substantive merits of a due process challenge to nonresident alien regulation: "[A] state's absolute bar of ownership of land by nonresident aliens has been held by the Supreme Court to be within the valid exercise of that state's police power, and not violative of due process of law under the Fourteenth Amendment." 323 F. Supp. at 1334.

[128] *See* Chicago B. & Q.R.R. v. City of Chicago, 166 U.S. 226, 241 (1897) (due process clause of fourteenth amendment requires just compensation be paid to owners of property condemned by the state). For a list of cases which imply a due process violation if a nonresident alien's property is confiscated without compensation, see note 122 *supra*. *But see* Pennsylvania Cent.Transp. Co. v. New York City, 438 U.S. 104, 122-28 (1977) (discussion of cases in which just compensation was not required upon governmental taking).

[129] Note, *supra* note 16, at 513 n.158.

[130] U.S. CONST. art. VI.

[131] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (Chinese Exclusion Case).

[132] U.S. CONST. art. VI, § 2.

D. Application of Naturalization, Commerce, and National Defense

The federal domain of regulation includes naturalization,[135] interstate and foreign commerce,[136] and national defense.[137] Federal power over naturalization and citizenship was the basis for invalidating alien restrictions in *Takahashi v. Fish and Game Commission*[138] and *Graham v. Richardson.*[139] The state limitations which affected the resident alien's ability to earn a living were contrary to the federal government's permission to the alien to establish permanent residence in the United States, and were thus ruled invalid.[140] Land laws may be viewed in a similar manner. At this time, however, no federal law comprehensively regulates foreign investment by nonresidents.[141] There-

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[133] Pennsylvania v. Nelson, 350 U.S. 497, 509 (1956) (state law preempted by federal Smith Act); Hines v. Davidowitz, 312 U.S. 52, 74 (1941) (state alien registration law preempted by federal provision).

[134] *See, e.g.,* Asakura v. City of Seattle, 265 U.S. 332, 341 (1924) (state law in conflict with federal treaty void); Hauenstein v. Lynham, 100 U.S. 483, 490 (1880) (federal treaty given effect over state law).

[135] U.S. CONST. art. I, § 8, cl.4; *see* Henderson v. Mayor of New York, 92 U.S. 259, 273 (1876) (states cannot exclude aliens admitted by federal government).

[136] U.S. CONST. art. I, § 8, cl.3.

[137] *Id.* at cl. 12.

[138] 334 U.S. 410 (1948).

[139] 403 U.S. 365 (1971).

[140] This protection does not extend to illegal aliens. *See* DeCanas v. Bica, 424 U.S. 351, 356 (1976) (valid exercise of police power to prohibit hiring of illegal aliens).

[141] Present federal laws generally affect foreign investment in specific industries. *See* 10 U.S.C. § 2272 (1976) (foreign participation in design and/or construction of military aircraft regulated); *id.* § 7435 (foreign leasing of naval petroleum reserve lands regulated); 12 U.S.C. §§ 1301-1308 (Supp. III 1979) (foreign investment in banking regulated); 16 U.S.C. § 797(e) (1976) (foreign participation in dam construction prohibited); 30 U.S.C. § 181 (1976) (foreign leasing of U.S. mineral lands regulated); *id.* § 1015 (foreign leasing for geothermal production prohibited); 33 U.S.C. §§ 1502(5), 1503(g) (1976) (foreign participation in deep water port operation and construction prohibited); 40 U.S.C. § 782 (1976) (foreign participation in Alaskan long-line communication prohibited); 42 U.S.C. §§ 2133, 2134 (1976) (foreign participation in atomic energy prohibited); 46 U.S.C. §§ 802, 835, 1151, 1152 (1976) (foreign participation in shipping industry regulated); 47 U.S.C. § 17222 (1976) (foreign participation in telegraph industry regulated); *id.* § 310 (Supp. III 1979) (foreign operation of radio station prohibited).

The bases of the federal laws are national defense, as well as foreign relations. Therefore, the federal law regulating alien ownership of private property does not focus on the same matters as do state laws on that subject. With the exception of seizure of the fore, state laws which limit nonresident alien investment are not a direct invasion of the immigration and naturalization laws.

The federal government has the power to regulate both interstate and foreign commerce.[142] Whether state regulations against foreign land purchasers interfere with foreign commerce may be examined from two perspectives. First, one may argue that land ownership does not fall within the scope of commerce, but rather is a local matter within the state's power.[143] Second, the interest of the state in controlling foreign investment does not fall within the state's commonly accepted police power, which includes health, safety, and welfare.[144] Despite these attacks on state laws through the foreign commerce power, the federal government has given tacit approval to state restrictions in this area by recognizing in recent treaties that state legislation regarding ownership and inheritance of land would apply.[145] Without federal legislation to displace state law, state statutes will probably not be invalidated on the sole basis that they interfere with the commerce clause.[146]

When the state is dealing with an enemy or hostile alien, federal legislation overrides any contrary state law.[147] For example, the Trading with the Enemy Act[148] provides for the Foreign Asset Control Regulations,[149] which permit the freezing of assets of certain countries.[150]

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assets of hostile aliens, there exists no federal legislation limiting foreign investment in privately-owned United States property.

[142] Congress has the exclusive power to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. *See* Katzenbach v. McClung, 379 U.S. 294, 304 (1964) (Congress may regulate specific businesses based on interstate commerce power); Board of Trustees v. United States, 289 U.S. 48, 58 (1933) (federal power to impose tariffs on goods); Weber v. Freed, 239 U.S. 325, 329 (1915) (federal power to restrict imports).

Foreign commerce appears to receive more protection against state regulation than does interstate commerce. *See, e.g.*, Brown v. Maryland, 25 U.S. (12 Wheat.) 419, 459 (1827) (state regulation of imports of foreign goods repugnant to Constitution).

[143] *See* note 11 and accompanying text *supra*.

[144] *E.g.*, Pike v. Bruce Church, Inc., 397 U.S. 137, 143 (1970) (statute regulating fruit containers valid exercise of police power); Breard v. Alexandria, 341 U.S. 622, 640 (1951) (door-to-door sales law valid exercise of police power).

[145] Morrison, *supra* note 9, at 657-59.

[146] *Id.* at 652.

[147] Congress has the exclusive power "to raise and support Armies." U.S. CONST. art. I, § 8, cl. 12. Under this power, Congress may also make peacetime provisions necessary for national defense. *See* Ashwander v. Tennessee Valley Auth., 297 U.S. 288, 340 (1936) (construction of dam important to national defense).

[148] 50 U.S.C. app. § 5 (1976 & Supp. III 1979).

[149] 31 C.F.R. §§ 500.101 through .809 (1980).

[150] *See* note 115 *supra*.

When extreme hostility arises between a country and the United States, the country may be added to the proscribed list without a formal declaration of war.[151]

III. THE EFFECT OF FOREIGN RELATIONS ON THE RIGHTS OF ALIENS

A. *The Impact of Treaties*

Valid treaties affect both state and federal laws, although new federal legislation overrides a preexisting treaty.[152] A treaty supersedes inconsistent state laws[153] and creates an obligation for the federal government under international law.[154] Furthermore, a state statute dealing with matters previously left to the state will be superseded by a valid treaty that grants to a party rights inconsistent with the statute.[155] Therefore, treaty rights offer the most common defense to enforcement of alien land restrictions.

Two specific types of treaties affect the foreign investor and state laws regulating investment. The first type, the bilateral treaty of friendship, commerce, and navigation, has extended national treatment to the majority of major investing nations.[156] The second type, the multilateral treaty, generally deals with a particular activity or problem.[157] However, there are few multilateral treaties regarding land because of difficulties in establishing uniform agreements in this area.[158]

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[151] *E.g.,* Iranian Assets Control Regulations, 31 C.F.R. §§ 535.101 through .904 (1980) (restrictions on United States real estate owned by Iranians).

[152] Reid v. Covert, 354 U.S. 1, 18 (1957); Moser v. United States, 341 U.S. 41, 45 (1951).

[153] The classic case is Hauenstein v. Lynham, 100 U.S. 483, 488-89 (1880) (state law that required escheat to state of real estate of aliens dying intestate preempted by treaty).

[154] A treaty is not a total constitutional restriction upon later national legislation. Treaties may be terminated by the President. If the United States repudiates a binding treaty, it is responsible for its breach of international law. In addition, subsequent inconsistent legislation is viewed as an implicit repeal of the effect of the treaty. Morrison, *supra* note 9, at 656-57.

[155] *See* Missouri v. Holland, 252 U.S. 416, 434-35 (1920) (state statute inconsistent with treaty invalid).

[156] *See, e.g.,* U.S. DEP'T OF STATE, TREATIES IN FORCE 1-245 (1981) (bilateral treaties in force Jan. 1, 1981).

[157] Morse, *Legal Structures Affecting International Real Estate Transactions,* 26 AM. UNIV. L.REV. 34, 38-39 (1976).

[158] The one significant multilateral agreement regarding foreign investment is the Organization for Economic Cooperation and Development Code. *See* Organization for Economic Cooperation and Development, *opened for signature,* Dec. 14, 1960, [1961] 2 U.S.T. 1728, 1751-52, T.I.A.S. No. 4891 (adherence of United States); Note, *The Rising*

Bilateral treaties of friendship, commerce, and navigation may be divided according to the era during which the treaty was negotiated. The pre-World War II treaties are selective, in that they cover only the problems the parties had at that time.[159] Post-World War II treaties are more comprehensive, however, and the most recent treaties offer national treatment to the foreign investor.[160] Such treatment means that the foreign contracting party is subject to the same restrictions that apply to American citizens. In exchange, United States citizens receive the same privileges abroad.[161] Recent bilateral treaties of friendship, commerce, and navigation permit the alien to engage in all types of commercial, industrial, and financial activities.[162]

In allowing foreign investors to do business in the United States, many treaties provide for the right to obtain land for operation of businesses.[163] However, these rights are not without restrictions. Most treaties expressly state that the United States has the right to limit or to exclude foreign activity in the exploitation of natural resources.[164] In addition, treaties often recognize state land law.[165] Modern agreements have protected the inheritance rights of aliens, however, by granting a specified time period to dispose of land in states which prohibit alien ownership.[166] Yet, in offering such protection, a treaty implies that the federal government permits state land ownership restrictions.[167]

Another feature of many of these treaties is the "most favored nation" clause, which grants a nation the most beneficial treatment given

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Tide of Reverse Flow: Would a Legislative Breakwater Violate U.S. Treaty Commitments?, 72 MICH. L. REV. 551, 557-80 (1974) (discussion of Code of Liberalization of Capital Movement).

[159] Morrison, *supra* note 9, at 657-58.

[160] *Id.* at 658-59.

[161] *See, e.g.*, Treaty of Friendship, Commerce and Navigation with the Netherlands, March 27, 1956, art. VII, para. 1, [1957] 8 U.S.T. 2043, T.I.A.S. No. 3942 (treaty provisions with reciprocal treatment of investors).

[162] Note, *supra* note 14, at 92.

[163] *E.g.*, Netherlands Treaty, *supra* note 161, at art. IX, para. 1. Few treaties, however, give a direct grant or denial of the right to own United States property. One exception is a treaty with France providing that nationals of both countries must receive governmental approval before purchasing real estate in the other country. Protocol to Convention of Establishment, Nov. 25, 1959, United States-France, para. 14, [1960] 11 U.S.T. 2398, 2423, T.I.A.S. No. 4625.

[164] *E.g.*, Netherlands Treaty, *supra* note 161, at art. VII, para. 2.

[165] *E.g.*, *id.* at art. IX, para. 1(b).

[166] *E.g.*, *id.* at para. 4; *see* Morse, *supra* note 157, at 40 (reasonable time three to five years).

[167] Morrison, *supra* note 9, at 660.

any alien in the country.[168] Approximately seventeen United States treaties contain an unconditional most favored nation clause.[169]

In sum, bilateral treaties have broad impact, permitting alien ownership of urban residential, industrial and commercial property.[170] Depending on the specific treaty limitations, ownership privileges may not be extended to agricultural land.[171] However, the national treatment provided for in most recent treaties of friendship, commerce, and navigation offers almost complete investment freedom.[172] Moreover, even though several treaties legitimate anti-alien inheritance state laws, they mitigate these laws by extending time for disposal of the land.[173]

B. *State Laws Intruding Upon Foreign Affairs*

No state may have its own independent foreign policy.[174] Whether state statutes regulating alien land possession constitute an invasion of the federal foreign relations power depends upon one's view of the state laws. Historically, when viewed as a control of property rights, the statutes have been deemed to deal with a local concern.[175] If the statutes are viewed as restraints on aliens, however, they enter the realm of international concern, and reach beyond the power of the states, since the focus shifts from land to relationships beyond national boundaries.[176]

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[168] *Id.* Thus, citizens of a country with which the United States has a most favored nation treaty are entitled to the same rights and privileges granted by treaty to citizens of other nations.

[169] Note, *supra* note 14, at 94.

[170] Morrison, *supra* note 9, at 661.

[171] *See, e.g.,* Convention of Establishment, Nov. 25, 1959, United States-France, art. VII, para. 2, [1960] 11 U.S.T. 2398, T.I.A.S. No. 4625, 401 U.N.T.S. 75 (either party may impose restrictions on alien ownership of certain interests); Treaty of Friendship, Commerce, & Navigation, Apr. 2, 1953, United States-Japan, art. IX, para. 2, [1953] 4 U.S.T. 2063, T.I.A.S. No. 2863, 206 U.N.T.S. 143 (same).

[172] Note, *supra* note 14, at 92. The author stated:

> There is almost no limit to the type of commercial activity they [treaty aliens] can engage in: they can organize or create new industry or an industrial plant, and can purchase or hold real estate as easily as any American citizen, regardless of state statutory language to the contrary. There is no numerical limitation as to percentage of control or absolute acreage to limit their holding.

Id.

[173] *See* De Tenorio v. McGowan, 510 F.2d 92, 96 (5th Cir. 1975) (treaty allowed three years for nonresident alien to sell interest); note 204 and accompanying text *infra.*

[174] Chae Chan Ping v. United States, 130 U.S. 581, 606 (1889) (Chinese Exclusion Case).

[175] Terrace v. Thompson, 263 U.S. 197, 217-18 (1923); Blythe v. Hinckley, 180 U.S. 333, 341-42 (1901); *cf.* Younger v. Harris, 401 U.S. 37, 44 (1971) (states should be free to carry out their distinctive functions).

In *Zschernig v. Miller,*[177] the United States Supreme Court established the principle that a state law which intrudes upon the field of foreign affairs may be invalidated.[178] In this case, a state statute restricting alien inheritance rights was used by the state courts to question the veracity of diplomatic certificates and to engage in its own political inquiries. The Court struck down the statute.[179]

Under *Zschernig,* the type of state intrusion that will be viewed as too diplomatically sensitive to be permitted is unclear.[180] Although an argument may be made that any state law that discriminates against nonresident aliens represents an impermissible intrusion into foreign relations,[181] this argument has not been upheld by the Supreme Court. However, a state law that directly discriminates against particular countries, or directly favors specific nations, would appear to be an establishment of an independent foreign policy and therefore to be subject to invalidation as an intrusion upon federal power over foreign affairs.[182]

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[176] *See* U.S. CONST. art. 1, § 10 (no state shall enter treaty).

[177] 389 U.S. 429 (1968).

[178] *Id.* at 432.

[179] *Id.* at 441. *But cf.* Clark v. Allen, 331 U.S. 503, 516-18 (1947) (state statute conditioning alien inheritance rights on reciprocity held not violative of federal power). Since *Clark* was not overruled by *Zschernig,* some courts have interpreted this to mean that *Zschernig* can be limited to its facts. In Bjarsch v. DiFalco, 314 F. Supp. 127 (S.D.N.Y. 1970), the court, construing *Clark* and *Zschernig,* held that statutes restricting alien inheritance do not intrude upon federal foreign policy. *Id.* at 133; *see In re* Kish's Estate, 52 N.J. 454, 246 A.2d 1, 8 (1968) (outlining limitations of *Zschernig*).

[180] In *Zschernig* Justice Douglas stated:

> It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way. The practice of state courts in withholding remittances to legatees residing in Communist countries or in preventing them from assigning them is notorious. The several States, of course, have traditionally regulated the descent and distribution of estates. *But those regulations must give way if they impair the effective exercise of the Nation's foreign policy.*

389 U.S. at 440 (emphasis added) (footnote omitted) (citing Berman, *Soviet Heirs in American Courts,* 62 COLUM. L. REV. 257 (1962); Chaitkin, *The Rights of Residents of Russia and Its Satellites to Share in Estates of American Decedents,* 25 S. CAL. L. REV. 297 (1952)).

[181] Note, *Alien Inheritance Statutes: An Examination of the Constitutionality of State Laws Restricting the Rights of Nonresident Aliens to Inherit from American Decedents,* 25 SYRACUSE L. REV. 597, 621-22 (1974).

[182] Morrison, *supra* note 9, at 649; *see* notes 183 through 186 and accompanying text *infra.*

IV. MISSISSIPPI LAW AFFECTING ALIEN OWNERSHIP OF LAND

A. Statutory Limitations

The Mississippi statute,[183] which exempts Syrians and Lebanese from the nonresident alien ownership prohibition is particularly vulnerable to constitutional attack. The statute provides that "citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi."[184] Such national favoritism indicates the exercise of too much independent foreign policy.[185] Thus, the statute should be invalid under the doctrine of exclusive federal power over foreign relations.[186]

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[183] MISS. CODE ANN. § 89-1-23 (1972) provides:

> Resident aliens may acquire and hold land, and may dispose of it and transmit it by descent, as citizens of the state may. Nonresident aliens shall not hereafter acquire or hold land, but a nonresident alien may have or take a lien on land to secure a debt, and at any sale thereof to enforce payment of the debt may purchase the same, and thereafter hold it, not longer than twenty years, with full power during said time to sell the land, in fee, to a citizen; or he may retain it by becoming a citizen within that time. All land held or acquired contrary to this section shall escheat to the state; but a title to real estate in the name of a citizen of the United States, or a person who has declared his intention of becoming a citizen, whether resident or nonresident, if he be a purchaser or holder, shall not be forfeited or escheated by reason of the alienage of any former owner or other person.
>
> Any person who was or is a citizen of the United States and became or becomes an alien by reason of marriage to a citizen of a foreign country, may hereafter inherit, or if he or she heretofore inherited or acquired or hereafter inherits, may hold, own, transmit by descent or transfer land free from any escheat to the State of Mississippi, if said land has not heretofore escheated by final valid order or decree of a court of competent jurisdiction.
>
> *Nonresident aliens who are citizens of Syria or the Lebanese Republic may inherit property from citizens or residents of the State of Mississippi.*

Id. (emphasis added).

[184] *Id.* This exemption has been in effect since 1938, but the reason for its addition to the statute is unknown. 1938 Miss. Laws, ch. 354. Because of the most favored nation treaties, the privileges extended to the citizens of Lebanon and Syria may also be enjoyed by the citizens of Spain, Sweden, Yugoslavia, and Argentina. Sullivan, *supra* note 3, at 20 n.25.

[185] Morrison, *supra* note 9, at 649.

[186] *Id.* Morrison raises a remedial problem:

> If the "special status" is void, other aliens would probably have no standing to sue; the only potential plaintiffs with an interest in challenging the law would be the next class of resident heirs, excluding nonresident aliens. In the common situation there are none, so the resident claimant is the state, but it may be precluded from arguing the substantive invalidity of its own laws.

Id. at 649 n.174.

The Mississippi limitation is based upon the residential status of the alien.[187] Seven other states have similar laws; they permit resident aliens to obtain real estate but limit landholding by nonresident aliens.[188] The Mississippi restriction on land ownership is not total, since the nonresident alien may purchase land at a foreclosure sale or take a lien to secure a debt and hold the lien or the land for up to twenty years.[189] If the nonresident alien declares his intention to obtain United States citizenship, he may retain the Missisisppi land indefinitely.[190]

B. *Inheritance by Aliens*

Two recent cases have dealt with the inheritance aspect of the alien landholding statute. In *Guiseppe v. Cozzani*,[191] Italian heirs of decedent Frank Toney, a resident of Vicksburg, claimed property in Mississippi under Toney's will.[192] However, a niece residing in Mississippi conspired with her son to take sole possession of the property.[193] Under a 1948 treaty with Italy, nonresident aliens receive due process of the law and three years to dispose of inherited property.[194] The Italian relatives, however, did not bring suit until twenty-five years after the interests in the property vested in Mississippi relatives.[195] The Mississippi Supreme Court held that the niece was a tenant in common with the Italian heirs[196] and was, therefore, a fiduciary and unable to claim the land by adverse possession.[197] Because of the concealed fraud of the Mississippi relative, the Italian relatives were not barred from maintaining a suit in equity.[198]

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[187] MISS. CONST. art. 4, § 84 provides authority for statutory restrictions on nonresident aliens: "The legislature shall enact laws to limit, restrict, or prevent the acquiring and holding of land in this state by nonresident aliens, and may limit or restrict the acquiring or holding of lands by corporations." For a listing of applicable Mississippi statutes, see note 8 *supra*.

[188] *See* note 71 *supra*.

[189] MISS. CODE ANN. § 89-1-23 (1972). For the text of the statute, see note 183 *supra*.

[190] MISS. CODE ANN. § 89-1-23 (1972); State *ex rel.* Brown v. Scottish Am. Mortgage Co., 111 Miss. 98, 106-07, 71 So. 291, 294 (1916).

[191] 193 So. 2d 549 (Miss. 1967). This case had been before the supreme court on two previous occasions. On its first appearance, the supreme court reversed a general demurrer to the amended complaint and remanded the cause for trial on the merits. Guiseppe v. Cozzani, 238 Miss. 273, 276, 280, 118 So. 2d 189, 189, 192 (1960). On its second appearance, the trial court had dismissed the complaint for delay. The supreme court again reversed and remanded for a trial on the merits. Guiseppe v. Cozzani, 248 Miss. 588, 595, 159 So. 2d 278, 281 (1964).

[192] 193 So. 2d at 552.

[193] *Id.* at 553.

[194] Treaty of Friendship, Commerce and Navigation, Feb. 2, 1948, United States-Italy, art. V, para. 2, art. VII, para. 2, 63 Stat. 2255, T.I.A.S. No. 1965.

[195] 193 So. 2d at 550, 552.

[196] *Id.* at 552.

In *DeTenorio v. McGowan*,[199] the district court reviewed facts similar to those in *Guiseppe* and held that a Honduran widow could not be divested of her interest in certain Mississippi land.[200] The Fifth Circuit reversed.[201] In this case, E.J. McGowan, a former Mississippian, died in Panama leaving his Honduran wife as his heir.[202] The surviving relatives of McGowan in Mississippi included his brother Hamilton, who had managed E.J. McGowan's Mississippi property for fifty-seven years.[203] Under a United States treaty with Honduras, the widow had three years to divest herself of the inherited land,[204] but that period had expired eleven years before suit was brought.[205] The treaty also stated that the time might "be reasonably prolonged if circumstances render it necessary."[206] The district court viewed Hamilton's failure to give his brother's widow actual notice of the property's existence as the required necessity for prolonging the three year divestiture period.[207] Chief Judge James P. Coleman, writing for the Fifth Circuit, held that Hamilton was neither a fiduciary nor a tenant in common and, therefore, owed no duty of notice to the widow.[208] Chief Judge Coleman further distinguished *DeTenorio* from *Guiseppe* on the basis that *Guiseppe* "turned on fraud, not on an extension of time under a Treaty."[209] After the three year period had expired without any action by the Honduran widow, the land descended to E.J. McGowan's brothers and sisters.[210]

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[197] *Id.* at 553 (quoting Nichols v. Gaddis & McLaurin, Inc., 222 Miss. 207, 221, 75 So. 2d 625, 629 (1954)).

[198] 193 So. 2d at 554. The niece in Mississippi had sold three parcels of the land during the 25 years that the Italian nieces and nephews had title. *Id.* at 552. The supreme court remanded for a decision on the respective ownership interests and an accounting of the proceeds from the sale and rental of the property between 1933 and 1967. *Id.* at 554.

[199] 364 F. Supp. 1051 (S.D. Miss. 1973), *rev'd*, 510 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975).

[200] 364 F. Supp. at 1062.

[201] 510 F.2d 92 (5th Cir.), *cert. denied*, 423 U.S. 877 (1975).

[202] 510 F.2d at 94. McGowan died intestate on Oct. 31, 1957. *Id.* His wife died intestate on Feb. 28, 1969. *Id.* at 95. The wife's sister brought suit. *Id.*

[203] *Id.* Hamilton paid the taxes, but acknowledged his brother's ownership. *Id.*

[204] *Id.* at 96 (quoting Treaty of Friendship, Commerce and Consular Rights, Dec. 7, 1927, United States-Honduras, art. IV, 45 Stat. 2618, T.S. No. 764).

[205] 510 F.2d at 96, 108.

[206] *Id.* at 96 (quoting Treaty, *supra* note 204, at art. IV).

[207] 364 F. Supp. at 1062.

[208] 510 F.2d at 100.

[209] *Id.* at 102.

Judge Godbold, in dissent, argued that Hamilton McGowan was a fiduciary and that no fraud need exist for a fiduciary to be held liable.[211] Judge Godbold stressed that a fiduciary relationship exists in domestic, personal situations, as well as in legal, conventional ones.[212] Thus, Hamilton had a duty to communicate the fact of his brother's property ownership to the Honduran widow.[213] The majority held that the widow should have inquired whether her husband owned any Mississippi land[214] and that she had constructive notice of the land ownership under Mississippi's recording statutes.[215] The dissent dismissed the widow's failure to inquire on the grounds that Hamilton was a fiduciary and owed a duty to disclose the facts.[216] The effect given the recording statute was viewed by the dissent as contrary to the holding in *Guiseppe* that actual notice was required.[217]

C. *Constitutional Problems*

In *DeTenorio,* the Mississippi law withstood a constitutional attack when the court held that the fourteenth amendment was inapplicable to an alien not within the state's jurisdiction.[218] Furthermore, the Mississippi statute avoids some of the equal protection problems faced by similar statutes of other states. In the South Carolina regulations,[219] for example, the use of the word "alien" without a description of residential status discriminates against the resident alien, a protected class under *Graham v. Richardson.*[220] Similarly, statutes that allow ownership for "citizens of the United States" face equal protection invalidation.[221] State regulations based on nonresidential status are less likely to be held unconstitutional than statutes which do not differentiate between resident and nonresident aliens.[222]

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[210] *Id.*; *see* MISS. CODE ANN. § 91-1-3 (1972) (descent of land).

[211] 510 F.2d at 102, 106.

[212] *Id.* at 103 (quoting Ham v. Ham, 146 Miss. 161, 173, 110 So. 583, 584 (1926) (fiduciary relationship held between brothers)).

[213] 510 F.2d at 107.

[214] *Id.* at 99.

[215] *Id.*; *see* Frierson Bldg. Supply Co. v. Pritchard, 253 Miss. 541, 552, 176 So. 2d 301, 305 (1965) (purpose of recording statutes is to give constructive notice); Aultman v. Kelly, 236 Miss. 1, 7, 109 So. 2d 344, 347 (1959) (recorded deed gives constructive notice).

[216] 510 F.2d at 111.

[217] *Id.* The Mississippi Supreme Court in *Guiseppe* stated, "How could this Court or any court hold that these illiterate people, 4,000 miles away, were given actual notice or the equivalent thereof by the filing of pleadings and deeds in the Warren County Chancery Clerk's Office in Vicksburg, Mississippi?" 193 So. 2d at 554.

[218] 510 F.2d at 101. The Lebanese and Syrian exemption was the subject of the constitutional attack. The court did not address the argument that the statute intrudes upon federal foreign affairs. *See* notes 174 through 186 and accompanying text *supra.* The court noted, however, that even if one part of the statute were declared unconstitutional, the other parts would remain unimpaired. 510 F.2d at 101; *see* 1940 Miss. Laws, ch. 237, § 4 (severability clause).

[219] S.C. CODE ANN. § 27-13-30 (1976).

State statutes which forbid foreign investments if the purchaser is an alien enemy will be preempted by the federal foreign affairs power.[223] The distinction between the statutory description of an alien in the Georgia code's use of "at peace"[224] and Virginia's use of "enemy"[225] presents a significant difference in a time of few declared wars. However, all statutes that invade the federal policies of war and peace are prohibited by the constitution.[226]

V. ENFORCEMENT PROBLEMS

A. *Circumvention of Anti-Alien Statutes*

In addition to the constitutional problems which many state alien land laws face, the regulations often contradict the state policy of encouraging foreign investment.[227] For six years, Mississippi maintained an office in Brussels to encourage foreign investors.[228] Yet, at the same time the Mississippi law expressly prohibited ownership of land by nonresident aliens.[229] This inconsistency in state policy poses a problem only to the less financially powerful alien,[230] however, because the educated and wealthy nonresident investor may bypass the state law through the use of corporations and trusts.[231] Constitutional challenges to the Mississippi statute, therefore, are unnecessary in light of the mechanical ineffectiveness of the statute.

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[220] 403 U.S. 365, 375-76 (1971); *see* notes 87 through 89 and accompanying text *supra.*

[221] *E.g.,* TEX. REV. CIV. STAT. ANN. art. 1537 (Vernon 1980). *But see* Note, *supra* note 158, at 569. Individual states are free to discriminate against out-of-state investors when they do not make a distinction between out-of-state American investors and treaty alien investors. *Id.*

[222] Note, *supra* note 14, at 98.

[223] *See* notes 174 through 186 and accompanying text *supra.*

[224] GA. CODE ANN. § 79-303 (1973).

[225] VA. CODE § 55-1 (1981).

[226] U.S. CONST. art. I, § 10, cl. 3.

[227] *See* note 16 *supra.*

[228] Telephone conversation with the Marketing Division of the Mississippi Department of Economic Development, Jackson, Miss., March 16, 1981. The Brussels office closed, however, in March, 1980. The Marketing Division office declined to comment on the reason for the closing. The small increase in foreign investment in Mississippi between 1974 and 1980 may provide the explanation.

[229] MISS. CODE ANN. § 89-1-23 (1972). For the full text of the statute, see note 183 *supra.*

The corporation, the most common business entity in the United States, offers a simple method for the alien investor to avoid state laws which prohibit only individual alien ownership.[232] Despite this obvious form of evasion, few states have enacted legislation to control land acquisition by alien corporations. The scarcity of regulations in this area may be attributed to the fact that few corporations existed at the time anti-alien statutes were enacted.[233]

A corporation which is not engaged in interstate commerce possesses only those rights given to it by the state in which it is doing business.[234] With the large number of corporations now in operation, states can no longer effectively screen the corporations that apply to do business within their boundaries. In addition, corporate purpose clauses now allow almost all legitimate businesses to incorporate and to own land.[235]

Mississippi has no statute restricting corporate ownership of private lands. Thus, a nonresident alien may easily avoid the prohibition of individual ownership by use of a corporation. Even in those states that do have corporate restrictions,[236] the serious alien investor is not hampered, since the statutes are often poorly drafted. Without express prohibitions as to which corporations will be restricted and without strict disclosure regulations, the statutes are an ineffective control over alien corporate ownership.[237] In addition, the financially powerful alien corporation may obtain legislative exemption.[238]

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[230] *See* Morrison, *supra* note 9, at 634, 637 (state restrictions fail to affect major alien investment).

[231] *Id.* at 623, 634-37; Weisman, *Restrictions on the Acquisition of Land by Aliens*, 28 Am. J. Comp. L. 39, 52-53 (1980).

[232] *See* F. Morrison & K. Krause, *supra* note 27, at 23.

[233] *Id.* at 21. The alien investor avoids statutory restrictions on land ownership by virtue of the fact that, as a shareholder, he owns an interest in the corporation owning the land, but not an interest in the land itself. *Id.* at 35.

Some states, however, do restrict alien land ownership through corporations. For example, Iowa and Nebraska exclude corporations with a majority of alien shareholders from ownership of land, while Wisconsin precludes such ownership if nonresident aliens hold more than 20% of the corporate shares. Morrison, *supra* note 9, at 634.

[234] Morrison, *supra* note 9, at 636.

[235] *See, e.g.*, ABA-ALI Model Bus. Corp. Act §§ 3, 4(d) (1979) (corporate purpose and power).

[236] *See* note 233 *supra*.

Another way in which the alien investor may avoid state land restrictions is through the use of a trust. The foreign purchaser may obtain land through a local broker or trustee.[239] Even though the deed may show that a trustee is acting in his representative capacity, it will not always identify the beneficiary of the trust, the actual purchaser.[240] Trusts are now a favorable conveying device because of tax[241] and confidentiality benefits.[242] No state statute expressly restricts the use of trusts to avoid alien land ownership prohibitions.[243]

Effective state disclosure laws would aid in determining the extent and type of alien investment in United States land, but few states have such laws.[244] Furthermore, disclosure statutes may face preemption by the recent federal disclosure act.[245]

B. Congressional Response

Congress responded to the uproar over foreign investment by enacting the Foreign Investment Study Act of 1974,[246] the International Investment Survey Act of 1976,[247] and the Agricultural Foreign Investment Disclosure Act of 1978.[248] The Foreign Investment Disclosure Act provides for detailed reporting of foreign investment in agricultural land.[249] Under the Act, a foreign purchaser is required to file a report with the Agricultural Stabilization and Conservation Service office in the county where the land is located.[250]

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[237] F. MORRISON & K. KRAUSE, *supra* note 27, at 35.

[238] For example, in 1956 a special session of the South Carolina legislature increased the maximum amount of land an alien might hold in the state from 500 to 500,000 acres. 1956 S.C. Acts 2971 (codified at S.C. CODE § 27-13-30 (1976)). The reported reason for the increase was to allow an English corporation to build a pulp mill in the state. Wall St. J., May 31, 1956, at 7, col. 1.

[239] F. MORRISON & K. KRAUSE, *supra* note 27, at 35.

[240] *Id.*

[241] *See* Warren, *Personal Trusts for Non-Resident Aliens,* 115 TRS. & ESTS. 660, 661-64 (Oct. 1976) (taxation of alien trusts).

[242] *Id.* at 661.

[243] *See* notes 71 through 75 *supra.*

[244] *E.g.,* IOWA CODE ANN. §§ 172 c.1 - 172 c.15 (West Supp. 1981); NEB. REV. STAT. §§ 76-1501, -1506 (1976); ILL. REV. STAT. ch. 5, §§ 601-608 (West Supp. 1981).

[245] 12 VAND. J. TRANSNAT'L L. 665, 682 (1979). Statutes that impose large penalties for failure to disclose have a deterrent effect on foreign investment and would be more likely to intrude upon the foreign relations power of the federal government. *Id.* at 683-86.

[246] Pub. L. No. 93-479, 88 Stat. 1450 (codified at 15 U.S.C. § 78b (1976 & Supp. III 1979)).

[247] Pub. L. No. 94-472, 90 Stat. 2059 (codified at 22 U.S.C. §§ 3101-3108 (1976 & Supp. III 1979)).

[248] Pub. L. No. 95-460, 92 Stat. 1263 (codified at 7 U.S.C. §§ 3501-3508 (Supp. III 1979)).

Statistics from the Act may be distorted due to several deficiencies in the requirements. First, no requirement exists for filing an update. Second, a report does not have to be filed when the land is changed from agricultural to nonagricultural use. Third, the amount of foreign ownership as a second tier interest in a United States corporation may fluctuate, but the obligation to file attaches at the time of purchase. Therefore, the foreign interest may drop below the required five percent between the acquisition and filing, and yet the name of the foreigner will appear in the report.[251]

C. *State Systems*

Problems in obtaining accurate information on foreign investment also arise in the state system of recording land transactions.[252] Since land purchases are diverse and are usually smaller investments than the acquisition of an industrial company, they receive less public scrutiny by the press. In addition, land records kept by county officials do not always identify the actual owner. The disorganization in state recording leaves the state with insufficient information about the amounts, prices, and types of nonresident alien investments. Without such knowledge, the state is dependent upon the Agricultural Foreign Investment Disclosure Act statistics, which are not comprehensive.[253]

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[249] The Act applies only to agricultural land, which is defined as "any land located in one or more States and used for agricultural, forestry, or timber production purposes [as defined further in] regulations to be prescribed by the Secretary [of Agriculture]." 7 U.S.C. § 3508(1) (Supp. III 1979).

[250] 7 C.F.R. §§ 781.1 through .5 (1981). The regulations became effective February 2, 1979. *Id.* § 781.3(a). All foreign persons holding agricultural land as of February 1, 1979, has until August 1, 1979 to file a report with the Secretary of Agriculture. *Id.* § 781.3(b). Acquisition or dispositions after February 2, 1979, must be reported within 90 days of the transfer. *Id.* § 781.3(c).

The Act defines "foreign person" as any individual who is not lawfully admitted to the United States for permanent residence. 7 U.S.C. § 3508.3 (Supp. III 1979). The Act requires all United States entities which have a "significant interest or substantial control . . . directly or indirectly held" by a foreign person to file a report. *Id.* § 3508(c)(ii). The requirement of "significant interest or substantial control" has been construed as five percent or more foreign ownership. REP. No. 447, *supra* note 32, at 2. The Act exempts reporting of security interests. 7 U.S.C. § 3501(a) (Supp. III 1979).

Only civil penalties are provided for noncompliance with the provisions of the Act. When a foreign person fails to file or falsely files, the Secretary of Agriculture determines the penalty, up to the maximum of 25% of the fair market value of the property interest on the date of the assessment of the penalty. *Id.* § 3502.

[251] Zedalis, *Disclosure of Foreign Investment in U.S. Agricultural Land,* 31 MERCER L. REV. 711, 724 (1980).

[252] MONITORING, *supra* note 18, at 27-28.

VI. A More Reasonable Approach

Foreign investment presents a viable and safe method of stimulating Mississippi's economy. While the other Sun Belt states have welcomed foreign capital,[254] Mississippi has adhered to an antiquated protectionist attitude. When the issue of foreign ownership is not approached at an emotional level,[255] the advantages of foreign capital may be analyzed. Foreign-owned land not only tends to remain under the same American management,[256] but often is more productive after the change of ownership.[257] In addition, the foreigner pays taxes to the municipal fund without receiving many of the benefits.[258]

State laws regarding alien investment have constitutional as well as mechanical problems. The equal protection clause of the fourteenth amendment has long protected resident aliens.[259] As nonresident aliens gain property rights within the various states, one may argue for an extension of equal protection to such foreign investors.[260] Even without constitutional problems, the state statutes are often ineffective because of the use of corporations and trusts to bypass state laws.[261]

Since the present Mississippi law is a total prohibition of nonresident alien ownership, it exacerbates the problem of disguised investments. Furthermore, past state efforts to encourage foreign investment have been totally inconsistent with the state laws.[262] In order to evaluate the importance of foreign capital, the myths surrounding foreign investment must be replaced with an accurate monitoring system. Monitoring foreign purchases will dispel the xenophobic overreaction which thwarts Mississippi's economic growth and disables acceptance of foreign capital as a necessary component in modern state economic policy.

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[253] *See* Zedalis, *supra* note 251, at 723-25 (data collected fails to depict extent of foreign land investment).

[254] *See* note 27 and accompanying text *supra*.

[255] *See* note 3 and accompanying text *supra*.

[256] *See* Rep. No. 447, *supra* note 32, at 26. The report indicated that foreign investors have changed operators in only about one-fourth of recent aquisitions of land. *See* notes 40, 41 and accompanying text *supra*.

[257] *See* note 42 and accompanying text *supra*.

[258] *See* note 46 and accompanying text *supra*.

[259] *See* notes 84 through 92 and accompanying text *supra*.

[260] *See* notes 104, 105 and accompanying text *supra*.

[261] *See* notes 230 through 243 and accompanying text *supra*.

[262] *See* notes 227 through 229 and accompanying text *supra*.

Ann S. Woodliff

RECENT DECISIONS

WORKER'S COMPENSATION—SECTION 9(I)—COMPROMISE SETTLEMENT SUBJECT TO REVIEW FOR CHANGED CONDITION OR MISTAKE IN DETERMINATION OF FACT

Claimant[1] filed a letter with the Mississippi Workmen's Compensation Commission requesting that a compromise settlement, effected under section 9(i)[2] of the Workmen's Compensation Law,[3] be reopened for further consideration. Claimant alleged that, at the time of the settlement, he was misinformed of his medical diagnosis and that this was sufficient basis for reopening.[4] Defendants moved to dismiss, contending that a compromise settlement could be reopened only upon a showing of fraud.[5] The administrative judge ordered that the case be reopened,[6] concluding that the compromise settlement and the Commission's approval thereof were based on misrepresentations of fact which allowed the carrier to overreach and to take unfair advantage of the claimant.[7] This order was appealed to the full Commission and was reversed.[8] The Commission's decision was reversed on appeal[9] to the

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[1] George Mason, a 38 year old illiterate from Harrison County, sustained a back injury while employed as a truck driver. The injury, which resulted in considerable permanent partial disability and medical treatment, was compensable under the employer's workers' compensation insurance. The employer's insurance carrier negotiated with claimant a $6,500 compromise settlement which was approved by the Workmen's Compensation Commission pursuant to section 9(i) of the Workmen's Compensation Law. *See* note 2 *infra*. Within a year after payment of the lump sum compromise, the claimant sought to reopen the case. The claimant's employer, Bailey Lumber Company, and the employer's insurance carrier, the Continental Insurance Company, were made defendants. Bailey Lumber Co. v. Mason, 401 So. 2d 696, 696-97 (Miss. 1981).

[2] Section 9(i) provides:

> Rules of the commission shall govern compromise payments where the prescribed schedules are not applicable and which, in its discretion, may be made in cases where it is not possible to determine the exact extent of disability, as for example in certain injuries to the back or head . . . . Commutation and lump sum settlement payments shall be governed by rules of the commission, and shall not be made except when determined to be in the best interest of the injured worker or his dependents, the commission having final authority in such questions.

MISS. CODE ANN. § 71-3-29 (1972).

[3] *Id.* §§ 71-3-1 to -111 (1972 & Supp. 1981).

[4] 401 So. 2d at 697. Claimant had been under the care of two local physicians, who both had submitted final medical reports to the insurance claims adjustor and the Commission prior to the settlement. These reports stated that the claimant was totally disabled. Neither the adjustor, the attorney for the insurance carrier, nor the administrative assistant at the Commission office, all of whom claimant had talked with during the settlement procedure, disclosed these findings to him. The settlement was evaluated and explained to the claimant on the basis of a 12½% permanent partial disability rating

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made by a third doctor to whom the adjustor had sent the claimant. The claimant accepted a lump sum compromise settlement based on the 12½% permanent partial disability rating, believing that this was the maximum he could obtain. *Id.* at 696-701.

[5] *Id.* at 707. The defendants based this contention on the court's ruling in Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961). 401 So. 2d at 707; *see* notes 48 through 53 and accompanying text *infra.*

[6] 401 So. 2d at 701.

[7] *Id.* The administrative judge based his decision on the following findings: (1) the claimant was of a low intelligence level and deeply in debt; (2) the experienced adjustor had possession of the attending physicians' medical reports which stated total disability, but had based the settlement amount offered on the 12½% permanent partial disability figure reported by the doctor to whom the adjustor had sent the claimant; (3) the adjustor and the insurance carrier's attorney failed to disclose to claimant the reports of total disability or to explain to him that such reports could entitle him to increased benefits; (4) the petition for compromise settlement prepared by the carrier's attorney failed to set forth the total disability reports of the claimant's attending physicians, and incorrectly stated that the claimant had been released to return to work and had suffered no loss of wage-earning capacity; (5) the interview with the Commission prior to approval of the 9(i) settlement to advise claimant of his rights under the Law did not satisfy its purpose because it was carried out by an inexperienced assistant who failed to explain that reports of total disability had been submitted or that such reports might entitle claimant to more money; (6) the full Commission erred in its determination that the settlement was in the claimant's best interest because of inaccuracies in the petition for settlement and the fact that such inaccuracies were not corrected by the recommendation submitted to the Commission by the administrative assistant; and (7) the claimant had accepted $6,500 as a final lump sum settlement under the mistaken belief that this was the maximum he was entitled to receive. *Id.* at 700-01.

[8] *Id.* at 701-02. The Commission noted that there was no corroborating evidence that the claimant did not know of the total disability report. Furthermore, the Commission found that the claimant's testimony that he did not understand the effect of the settlement was directly refuted by the testimony of the adjustor, the insurance carrier's attorney, and the Commission's representative. The Commission, finding that the claimant understood the effect of the settlement, concluded that in light of Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961), the reopening of the settlement was not in order because there was no showing of fraud or unfair advantage. 401 So. 2d at 701-02; *see* notes 48 through 53 and accompanying text *infra.*

[9] 401 So. 2d at 697. The Workmen's Compensation Law provides that the circuit court of the county in which the injury occurred may review a final Commission compensation award. To effect an appeal, a notice of appeal must be filed with the Commission within 30 days from the date when the award was filed in the Commission's office. MISS.

Circuit Court of Harrison County.[10] On appeal to the Mississippi Supreme Court, *held,* affirmed.[11] A compromise settlement pursuant to section 9(i) may be reopened under section 21[12] upon a showing of a change in condition or a mistake in determination of fact, including a mistake of fact by the Commission that a compromise settlement is in the best interest of claimant. *Bailey Lumber Co. v. Mason,* 401 So. 2d 696 (Miss. 1981).

Workers' compensation, a relatively new field of law,[13] evolved as an expression of the modern social concept that the liability of the employer for work-related accidents should be based on the accident's relation to the job, rather than on the negligence of the employer.[14] The concept was meant to remedy the harshness of the common law requirement that the injured employee prove employer negligence in or-

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CODE ANN. § 71-3-51 (1972).

[10] 401 So. 2d at 702. The court reasoned that the Commission's factual finding that the claimant understood the settlement and voluntarily decided to abandon the total disability claim was error in light of the inference drawn from the facts concerning the settlement. *See* note 7 *supra.* "The court finds it hard to believe that one properly informed would compromise for less than he is obviously entitled. It is clearly revealed by the record that this is what the Claimant did." 401 So. 2d at 702. Furthermore, the court concluded that the legal finding of the Commission that Dixon v. Green, 240 Miss. 204, 126 So. 2d 662 (1961) precluded a reopening of a compromise settlement absent a showing of fraud or unfair advantage was incorrect. The court based this conclusion on the fact that the *Dixon* court did not reach the question of reopening pursuant to section 21 of the Law. *See* note 12 *infra.* The court found that since there was no distinction drawn in section 21 over what types of claims could be petitioned for reopening under the one-year continuing jurisdiction of the statute, then compromise settlements could be reopened if there was the requisite showing of change in condition or a mistake in determination of fact. The court reasoned that the Commission's conclusion that the settlement was in the best interest of the claimant constituted a mistake in determination of fact which would allow the compromise settlement to be reopened under section 21. 401 So. 2d at 702-05.

[11] 401 So. 2d at 708. The court remanded the case to the Commission for further proceedings. *Id.*

[12] Section 21 provides:

> Upon its own initiative or upon the application of any party in interest on the ground of a change in conditions or because of a mistake in a determination of fact, the commission may, at any time prior to one (1) year after date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one (1) year after the rejection of a claim, review a compensation case, issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. . . .

MISS. CODE ANN. § 71-3-53 (1972).

[13] *See* 1 A. LARSON, WORKMEN'S COMPENSATION LAW §§ 5.00, .10 (1978).

[14] S. HOROVITZ, INJURY AND DEATH UNDER WORKMEN'S COMPENSATION LAWS 5 (1944).

der to recover damages for a work-related injury.[15] This concept was embodied first in the German Compensation Act of 1884.[16] Unlike the German system of compulsory workers' compensation coverage, whereby both the employer and employee contributed to the insurance needs of the plan, the American state systems were founded and developed on unilateral employer contribution.[17]

Although the basic concept behind the workers' compensation laws is the same, states vary in the administrative structure provided to administer the compensation system.[18] In most jurisdictions, administrative responsibility and authority is vested in a special state agency, usually in the form of an administrative commission.[19] Only five states rely on court administration of the laws.[20] In 1948, Mississippi became the last of the then forty-eight states to enact workers' compensation legislation,[21] adopting the commission form of administration.[22]

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[15] *Id.*

[16] Lewis and Clark County v. Industrial Accident Bd., 52 Mont. 6, 155 P. 268, 270 (1916). England followed Germany 13 years later with the passage of workers' compensation laws. The English laws were prompted by the failure of the common law to afford adequate remedies for the increasing number of injuries and deaths resulting from industrial growth. The workers' compensation concept spread rapidly to the United States, with New York adopting legislation in 1910 modeled after that of England and Germany. By 1920 all but six states had passed workers' compensation laws. Hopkins, *Heart Attacks in Workmen's Compensation—The Mississippi Experience*, 44 MISS. L.J. 226, 227-28 (1973).

[17] 1 A. LARSON, *supra* note 13, § 5.10. Although each state has adopted its own workers' compensation act, the various acts contain certain common features. Among these are: the worker receives automatic benefits if he suffers injury arising out of and in the course of his employment; fault is largely immaterial to liability; coverage is limited to persons having the status of employee; the common law right to sue the employer for injury covered under the act is forfeited; the common law right to sue third persons whose negligence caused the injury is retained; and the employer must secure insurance through private insurance, state-fund insurance or "self-insurance." *Id.* § 1.10.

[18] W. MALONE, M. PLANT & J. LITTLE, WORKERS' COMPENSATION AND EMPLOYMENT RIGHTS 400 (2d ed. 1980).

[19] *Id.*

[20] *Id.* In this group, however, Alabama, New Mexico, Tennessee, and Wyoming provide for an administrative agency primarily responsible for clerical work. Louisiana is the only state which relies entirely on court administration. *Id.*

[21] Satterfield, *An Introduction to the Mississippi Workmen's Compensation Act*, 20 MISS. L.J. 27, 27-28 (1948-1949). The purpose of the Mississippi law was to relieve society of the burden of supporting employees and their dependents because of the economic loss suffered due to injury or death in industrial accidents. The Law carried out this purpose by making the employer an insurer of all employees regardless of negligence or fault, subject to very limited exceptions. Hopkins, *supra* note 16, at 228. Being one of the last states to adopt such legislation, Mississippi drew from the other states' experiences and adopted what is considered one of the most liberal and best written acts in the

Just as the administrative structures employed vary from state to state, the administrative procedures for handling compensation claims are equally diverse.[23] It is possible, however, to identify some general categories.[24] Most claims are uncontested,[25] and the majority of states utilize the agreement system to deal with these claims.[26] This system allows the employer to discharge his obligation by proposing a settlement, subject to the employee's acceptance and approval by the administrative body.[27] Most of the states that use this system invalidate, by statute, any agreement in which the claimant receives less than the statutory amount.[28] The minority of states, including Mississippi,[29] employ a direct payment system to handle uncontested claims.[30] Under

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nation. The court's initial workers' compensation opinions reflected its decision that the Mississippi law should receive a liberal, but reasonable, construction in favor of the claimant. 34 Miss. L.J. 220, 221 (1963). The court has continued to give a liberal construction to the Law. *See, e.g.,* Pontotoc Wire Prod. Co. v. Ferguson, 384 So. 2d 601, 603 (Miss. 1980) (law should be construed generously to advance its underlying remedial aims); Big "2" Engine Rebuilders v. Freeman, 379 So. 2d 888, 889 (Miss. 1980) (law should be construed so as to resolve doubtful cases in claimant's favor, thereby fulfilling humanitarian aim of promotion of worker welfare); Evans v. Continental Grain Co., 372 So. 2d 265, 269 (Miss. 1979) (workers' compensation statutes should be given liberal construction in favor of claimant).

[22] Miss. Code Ann. § 71-3-1 (1972). The court in construing this statute held that it vested full and complete jurisdiction in the Mississippi Workmen's Compensation Commission to hear and determine claims for benefits under the Law. Everitt v. Lovitt, 192 So. 2d 422, 425 (Miss. 1966).

[23] W. Malone, M. Plant & J. Little, *supra* note 18, at 400.

[24] *Id.*

[25] *Id.* at 403-04. A claim is uncontested if there is no dispute as to the liability of the employer to compensate or as to the amount of compensation. W. Dodd, Administration of Workmen's Compensation 117 (1936). The prime function of the administrative body in uncontested cases is to ensure that the employer and those required to pay compensation fulfill their obligations under the law. W. Malone, M. Plant & J. Little, *supra* note 18, at 403.

[26] W. Malone, M. Plant & J. Little, *supra* note 18, at 403; *see, e.g.,* Conn. Gen. Stat. Ann. § 31-296 (West Supp. 1981) (agreement system provided); Del. Code Ann. tit. 19, § 2344 (1979) (same); Idaho Code § 72-711 (1973) (same); Ky. Rev. Stat. Ann. § 342.265 (Baldwin 1979) (same).

[27] W. Malone, M. Plant & J. Little, *supra* note 18, at 403-04.

[28] 3 A. Larson, Workmen's Compensation Law § 82.00 (1976); *see, e.g.,* Conn. Gen. Stat. Ann. § 31-296 (West Supp. 1981) (agreement must be within statutory provisions); Ind. Code Ann. § 22-3-7-30 (Burns 1974) (same); Mass. Gen. Laws Ann. ch. 152, § 6 (West 1958) (same); Neb. Rev. Stat. § 48-136 (Supp. 1978) (same).

[29] *See* Miss. Code Ann. § 71-3-37 (1972).

[30] W. Malone, M. Plant & J. Little, *supra* note 18, at 404. Some of the other states which follow this system are Arkansas, Michigan, New Hampshire, and New York. *Id.*

this system, the employer immediately begins payment according to the statutory schedules and reports such payments to the administrative body.[31]

Contested claims[32] normally are handled with an informal hearing by the administrative body which determines the disputed matters and then makes an award of compensation.[33] In a number of states, however, contested claims are allowed by statute to be resolved by compromise settlement between the parties, subject usually to approval by the administrative body.[34] In the absence of statutory authority for compromise settlement of contested claims, most decisions have held that there can be no compromise of compensation rights for less than the statutory amount,[35] but a few decisions have held that a contested claim for compensation may be compromised like any other claim.[36] Mississippi's statutory provisions[37] allow compromise settlement, but only in very limited circumstances.[38]

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[31] *Id.* The employer reports directly to the administrative body both upon beginning and terminating payments. *Id.*

[32] A claim is contested if there is a dispute as to the employee's right to compensation benefits or the amount of benefits. W. DODD, *supra* note 25, at 117.

[33] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 405.

[34] *See, e.g.,* ALA. CODE § 25-5-56 (1975) (settlement may be made for less than the article stipulates if it is in the best interest of the parties and is approved by a judge of the circuit court of the county); ARK. STAT. ANN. § 81-1319(k)(2) (1976) (petition for final settlement will be approved upon the Commission's determination that it is in the employee's best interest); CAL. LABOR CODE §§ 5000-5002 (West 1971) (parties have the right, subject to board approval, to compromise any liability claimed to exist on account of injury or death); GA. CODE ANN. § 114-106 (Supp. 1981) (compromise settlement may be made in cases of conflicting evidence and, upon approval by board, shall be the complete and final disposition of the claim, with no right by board to review); HAWAII REV. STAT. § 386-78 (1976) (parties have the right, subject to board approval, to compromise a claim for compensation); ILL. ANN. STAT. ch. 48, § 138.23 (Smith-Hurd Supp. 1981-1982) (same); LA. REV. STAT. ANN. § 23.1271 (West Supp. 1981) (if dispute concerns liability or coverage, parties have right to compromise, subject to approval by county district court judge); MD. ANN. CODE art. 101, § 52 (Supp. 1980) (parties have the right to compromise upon such terms as Commission deems proper and, upon approval, no future proceedings will be allowed unless Commission specifically orders otherwise); MINN. STAT. ANN. § 176.521 (West Supp. 1980) (parties have the right, subject to board approval, to settle any claim); MO. ANN. STAT. § 287.390 (Vernon Supp. 1981) (compromise settlement approved by administrative law judge or Commission will bar all subsequent claims, except disputes as to extent of disability or rate of compensation); TEX. REV. CIV. STAT. ANN. art. 8307, § 12 (1967) (board may approve any compromise or settlement where liability or extent of the injury is uncertain); WIS. STAT. ANN. § 102.16 (West 1973) (parties may settle any controversy concerning compensation, and board, upon review, may set aside, modify, or confirm within one year of filing). *But see* N.Y. WORK. COMP. LAW § 33 (McKinney Supp. 1981) (statute specifically prohibits waiver or compromise of compensation by agreement of the parties).

[35] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 413; *see, e.g.,* Green v. Workmen's Compensation Appeal Bd., 43 Pa. Commw. Ct. 143, 401 A.2d 1243, 1245 (1979) (settlement not in line with the statutory provisions for lump sum commutation is

Although compromise settlements are designed to provide a final disposition of contested claims, such settlements have been subject to review and reopening in certain circumstances.[39] Reopening is dependent upon the statutes and decisions of the particular jurisdiction involved[40] because each state's scheme for reopening is unique.[41] Some states that allow compromise settlements of contested claims specify by statute under what circumstances a settlement may be reopened by the administrative body,[42] while other states, by statute, merely give the administrative body the right to reopen.[43] When there is no specific

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void since contrary to intent of the Act); Southern v. Department of Labor and Indus., 39 Wash. 2d 475, 236 P.2d 548, 550-51 (1951) (compromise of benefits for total and permanent disability held void).

[36] W. MALONE, M. PLANT & J. LITTLE, *supra* note 18, at 413-14; *see, e.g.*, Employers' Mut. Liab. Ins. Co. v. Industrial Comm'n, 121 Ariz. 558, 592 P.2d 392, 395 (Ct. App. 1979) (if Commission determines that settlement was entered into fairly, then compromise settlement does not have to mirror statutory compensation provisions); Dotson v. Proctor & Gamble Mfg. Co., 102 Kan. 248, 169 P. 1136, 1137-38 (1918) (court refused to set aside settlement agreement in the absence of fraud).

[37] MISS. CODE ANN. § 73-3-29 (1972).

[38] *See* note 2 *supra*. Compromise settlements are allowed by the Commission only in cases where the prescribed schedules are not applicable, it is not possible to determine the extent of disability involved, and it is deemed to be in the best interest of the employee. Such settlements are initially negotiated by the parties and submitted to the Commission for approval by petition of the claimant. V. DUNN, MISSISSIPPI'S WORKMEN'S COMPENSATION § 391 (2d ed. 1967). All compromise settlements are considered by the Commission on specified days of each week. It is the general procedure for the Commission to interview the claimant to any proposed settlement to determine that the claimant understands the settlement and that it is in his best interest. *Id.* § 389. This interview is required for claimants who are not represented by counsel. MISS. WORKMEN'S COMP. LAW PROC. R. 15 (1965).

[39] *See* notes 42 through 46 and accompanying text *infra*.

[40] Annot., 165 A.L.R. 9, 36 (1946).

[41] Note, *Workmen's Compensation—Reopening in Tennessee*, 7 MEM. ST. U.L. REV. 261, 263 (1977).

[42] *See, e.g.*, ALA. CODE § 25-5-56 (1975) (settlement can be vacated for fraud, undue influence, or coercion upon application of party to the approving judge within six months of the date of settlement); LA. REV. STAT. ANN. § 23.1273 (West 1964) (settlement shall not be set aside except for fraud or misrepresentation).

[43] *See, e.g.*, HAWAII REV. STAT. § 386-78 (1976) (compromise settlement approved by board shall not prejudice claimant's right to reopen case); MD. ANN. CODE art. 101, § 52 (Supp. 1980) (upon approval of compromise settlement, no future proceeding will be allowed unless Commission specifically orders otherwise); MINN. STAT. ANN. § 176.521 (West Supp. 1981) (worker's compensation court of appeals may set aside settlement

statutory provision for reopening a compromise settlement, the decisions in some jurisdictions have allowed the reopening by resort to the general review statute of the particular state's act.[44] Without reference to the general review statute, other decisions have allowed reopening by the administrative body, but only upon limited grounds such as fraud, change in condition, or insanity.[45] Still other courts have held that an approved compromise settlement is a jurisdictional bar to the administrative body's right to review, and have referred the claimant to the courts for relief.[46] Mississippi's law, in section 21,[47] provides for general review, but does not provide specifically for reopening of a compromise settlement.

In the case of *Dixon v. Green,*[48] the Mississippi Supreme Court

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pursuant to this chapter); WIS. STAT. ANN. § 102.16 (West 1973) (board can set aside or modify compromise settlement within one year after approval).

[44] *See, e.g.,* Hohn v. Alaska Indus. Bd., 150 F. Supp. 519, 521-22 (D. Alaska 1957) (general review statute gives board authority to set aside compromise when based upon fraud or mistake); Silva v. Industrial Comm'n, 68 Cal. App. 510, 229 P. 870, 871-72 (1924) (general review provision gives board authority to review compromise settlement approval orders, but only upon showing of fraud, mistake, duress, or undue influence); Ahler v. Sears Roebuck & Co., 54 Ill. App. 3d 638, 369 N.E.2d 1306, 1309 (1977) (in fixing jurisdiction of Commission to review settlement, approved settlement is, in legal effect, an award), *aff'd,* 73 Ill. 2d 638, 383 N.E.2d 207 (1978); Wollschlager v. Standard Constr. Co., 300 Minn. 550, 220 N.W.2d 346, 346 (1974) (as in any award, Commission has authority to set aside approved settlement upon showing of fraud, mistake, newly discovered evidence, or substantial change in condition). *But see* Commercial Cas. Ins. v. Hilton, 126 Tex. 497, 87 S.W.2d 1081, 1082-83 (1935) (since compromise settlement is not an award of compensation, board has no review jurisdiction under the review statute governing awards).

[45] *See, e.g.,* Cook v. Brown, 246 Ark. 11, 436 S.W.2d 482, 483 (1969) (since statute provides that settlement is final, Commission has no review jurisdiction without showing of fraud or insanity); National Union Ins. Co. v. Mills, 99 Ga. App. 697, 109 S.E.2d 830, 831 (1959) (approved settlement is not subject to board review absent change in condition or fraud in procurement).

[46] *See, e.g.,* Mosier v. St. Joseph Lead Co., 205 S.W.2d 227, 232 (Mo. Ct. App. 1947) (approval of compromise settlement exhausted jurisdiction of Commission and claimant's only relief was by suit in equity court upon grounds of fraud or mistake); Luersen v. Transamerica Ins. Co., 550 S.W.2d 171, 173 (Tex. Civ. App. 1977) (board has no authority to set aside approved compromise settlement, but court has jurisdiction to set aside on grounds of fraud or mistake).

[47] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra.*

[48] 240 Miss. 204, 127 So. 2d 662 (1961). Claimant had suffered a subarachnoid hemmorhage while moving concrete culvert pipes for Green. After negotiations between the employee and the employer's insurance carrier, a petition for a lump sum compromise settlement of $1,000 was submitted to the Commission. The petition set out the facts and the doubtful causal connection of the claim. The Commission approved the settlement and the claimant subsequently sought to set aside the approval order and to re-

was confronted for the first time with the question whether a compromise settlement, under section 9(i),[49] could be reopened under section 21[50] of the Mississippi law. In *Dixon,* the court denied the claimant's petition to reopen because there was no evidence of fraud or unfair advantage, and because the claimant fully understood the questionable nature of his claim and the final effect of the compromise settlement.[51] The court concluded that section 21 of the Law,[52] authorizing reopening of compensation cases for changed condition or mistake in a fact determination, did not apply, but declined to decide the question whether this section could be utilized under different circumstances to reopen a compromise settlement.[53] One year later, in *Armstrong Tire & Rubber Co. v. Franks,*[54] the court approved the reopening of a section 13(j) lump sum award[55] under section 21.[56] The court, however, noting that the *Dixon* court had pretermitted the question whether section 21 would apply to a 9(i) settlement, found that such was not in issue and left the question unanswered.[57]

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open his claim for further compensation and redetermination of his liability. *Id.* at 207-08, 127 So. 2d at 663.

[49] Miss. Code Ann. § 71-3-29 (1972); *see* note 2 *supra.*

[50] Miss. Code Ann. § 71-3-53 (1972); *see* note 12 *supra.*

[51] 240 Miss. at 208-09, 127 So. 2d at 664. A leading authority on Mississippi's Workmen's Compensation Laws has interpreted *Dixon's* effect on the reopening of compromise settlements to be the following: "[I]t has been intimated, although not expressly decided, that the compromise settlement may not be reviewed or vacated, at least in the absence of a showing of fraud upon or the taking of an unfair advantage of the claimant in connection therewith." V. Dunn, *supra* note 38, § 339 (citing Dixon v. Green, 240 Miss. 204, 127 So. 2d 662 (1961)).

[52] Miss. Code Ann. § 71-3-53 (1972); *see* note 12 *supra.*

[53] 240 Miss. at 209, 127 So. 2d at 664.

[54] 242 Miss. 792, 137 So. 2d 141 (1962). The claimant suffered a work-related arm injury for which he was to be paid temporary total disability benefits for 60 weeks. A lump sum payment, whereby the claimant is paid the present value of future payments, was agreed upon between the parties and approved by the Commission. This lump sum was based on a 50% disability rating. Subsequently, the claimant filed to reopen under section 21, alleging that there had been a mistake in a determination of fact because he had 100% disability of his arm. *Id.* at 796-99, 137 So. 2d at 142-44.

[55] Section 13(j) provides:

> Whenever the commission determines that it is for the best interests of a person entitled to compensation, the liability of the employer for compensation, or any part thereof as determined by the commission, may be discharged by the payment of a lump sum equal to the present value of future compensation payments commuted, computed at four per centum (4%) true discount compounded annually. . . .

Miss. Code Ann. § 71-3-37(10) (1972).

[56] 242 Miss. at 801, 137 So. 2d at 145.

[57] *Id.* at 803, 137 So. 2d at 146.

In the instant case, the court reasoned that since the application of section 21[58] to a section 9(i)[59] compromise settlement was not addressed by the court in *Dixon v. Green,* the question was left open for future determination.[60] The court further reasoned that since section 21 made no distinction between compromise settlements and lump sum awards, and since lump sum awards had been allowed to be reopened under section 21,[61] then compromise settlements could be reopened under section 21.[62] The court found that since the settlement was not sufficiently analyzed by the Commission and since the Commission was not given facts that would have shown that unfair advantage had been taken of the claimant,[63] then the Commission made a mistake in its determination of fact that the settlement was in the claimant's best interest.[64] The court therefore concluded that since section 21 permits the Commission to review a case, because of a mistake in determination of fact, within one year from the date of the last payment, then the petition in this instance met these requirements and should have been reopened by the Commission.[65]

In dissent, Justice Robertson, joined by three other justices,[66] reasoned that since the court has stated that the Commission is the fact finder and that its decisions would not be disturbed if supported by substantial evidence,[67] then the present decision of the Commission should not have been overturned by the circuit court because it was supported by overwhelming evidence.[68]

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[58] MISS. CODE ANN. § 71-3-53 (1972); *see* note 12 *supra.*

[59] MISS. CODE ANN. § 71-3-29 (1972); *see* note 2 *supra.*

[60] Bailey Lumber Co. v. Mason, 401 So. 2d 696, 705-06 (Miss. 1981) (quoting Dixon v. Green, 240 Miss. 204, 209, 127 So. 2d 662, 664 (1961) and Armstrong Tire & Rubber Co. v. Franks, 242 Miss. 792, 803, 137 So. 2d 141, 146 (1962)).

[61] *See* notes 54 through 57 and accompanying text *supra.*

[62] 401 So. 2d at 704, 707. At this point in its analysis, the court stated the reasoning of the circuit court and, by implication, adopted the lower court's rationale by finding no error in its decision.

[63] *Id.* at 708; *see* note 7 *supra.*

[64] 401 So. 2d at 707. The lower court had based its conclusion on a statement made in 3 A. LARSON, *supra* note 28, § 81.52 (1976) that a mistake in determination of fact, under statutes which utilize this ground for review, includes a mistake on the part of the finder of fact. 401 So. 2d at 704. Because the court found no error in the lower court's decision, it should follow that the court agreed with this conclusion.

[65] 401 So. 2d at 707-08.

[66] Justices Smith, Walker, and Broom joined in the dissent. *Id.* at 716.

[67] *Id.* at 715 (quoting Roberts v. Junior Food Mart, 308 So. 2d 232, 234 (Miss. 1972) and citing Shippers Express v. Chapman, 364 So. 2d 1097 (Miss. 1978)).

[68] 401 So. 2d at 715-16. The dissenters extensively recited the opinion of the Commission, impliedly adopting its rationale. *See* note 8 *supra.* Furthermore, the dissent

The instant case will have the immediate effect of ending any uncertainty over whether an approved compromise settlement may be reopened by the Commission pursuant to section 21. Until this decision, it was assumed that a compromise settlement could not be reopened absent a showing of fraud or unfair advantage.[69] The court's decision, however, effectively extends, through section 21, the Commission's power to reopen compromise settlements where there is a change in condition or a mistake in a determination of fact.[70]

The instant case is distinguishable factually from *Dixon v. Green.*[71] In *Dixon,* the claimant was informed of and understood the full extent of his injury,[72] while in the instant case the claimant was misinformed about the extent of his disability.[73] The court in the instant case, therefore, was able to grant relief under section 21 by holding that the Commission's approval was a mistake in determination of fact.[74] The mistake was that the compromise settlement was not in the best interest of the claimant since he was misinformed as to his injury.[75] The court's classification of this misinformation as a mistake in determination of fact is in accord with decisions of other states having similar statutory provisions.[76] Also, the court's use of the general review statute to reopen the compromise settlement is not novel, but is in line with some other jurisdictions.[77] It does appear, however, that the court's decision is consistent with the historic liberality of construction given to the Mississippi law by the court.[78] Decisions of another group of similarly situated jurisdictions have held that the general review statutes are not applicable and that reopening will be

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noted that the uncorroborated testimony that claimant did not understand the settlement's effect was self-serving and refuted by other witnesses. The dissent found that the claimant's evidence was further weakened by the fact that he had signed and acknowledged a number of forms necessary for the completion of the settlement, all of which stated in some manner that the settlement would be the final disposition of his claim. The dissent, therefore, concluded, based on the foregoing facts, that the decision of the Commission was supported by overwhelming evidence and should have been reinstated. *Id.* at 710-16.

[69] *See* note 51 *supra.*

[70] *See* note 12 *supra.*

[71] *See* notes 48 through 53 and accompanying text *supra.*

[72] *See* notes 48 through 53 and accompanying text *supra.*

[73] *See* note 7 *supra.*

[74] *See* note 64 and accompanying text *supra.*

[75] *See* note 64 and accompanying text *supra.*

[76] *See* note 64 *supra.*

[77] *See* note 44 and accompanying text *supra.*

[78] *See* note 21 and accompanying text *supra.*

allowed only upon such limited grounds as fraud or mistake.[79]

The dissenters, on the other hand, would not have allowed reopening because the claimant knowingly had signed forms stating that the compromise was the final disposition of his claim.[80] The fallacy in the minority's logic lies in its failure to recognize from the facts that the claimant had not been fully informed of all circumstances when he signed such settlement forms. The majority, recognizing that the claimant had not been adequately informed, reached the more equitable result which protected the welfare of the claimant.

Because this equitable decision will, however, subject compromise settlements to reopening for changed condition or mistaken fact determination, where such settlements were previously thought to be the final disposition of the claim, it is likely to have a profound effect on the administrative procedures required for obtaining a compromise settlement. In the instant case, the mistake in determination of fact was due in part to inaccuracies in the petition for settlement.[81] It would appear, therefore, that the Commission should prescribe a standard form or format that would help assure that all pertinent facts and medical data are included. Furthermore, even though the administrative rules presently require that the Commission interview a claimant when he is not represented by counsel,[82] the Commission may wish to take measures to further tighten the interview requirements or to adhere more closely to the present requirements so as to promote full disclosure to the claimant of his rights and of the pertinent facts. Finally, because such settlement could be subject to reopening for an error in approval, the Commission, if not amply convinced that all the facts are before it or that the settlement is in the claimant's best interest, may be more likely to reject the petition and to require an informal hearing to determine the disputed matters and to make an award.

These additional requirements and increased scrutiny by the Commission would most likely increase the burden on the employer's insurance carrier in procuring a valid compromise settlement. On the other hand, the stricter standards should help assure that the claimant receives the full benefits of the Law.

Gina M. Jacobs

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[79] *See* note 45 and accompanying text *supra.*

[80] *See* note 68 *supra.*

[81] *See* note 7 *supra.*

[82] *See* note 38 *supra.*

CONSTITUTIONAL LAW—DISCRIMINATORY VOTE DILUTION—PURPOSEFUL DISCRIMINATION MAY BE INFERRED FROM THE TOTALITY OF THE CIRCUMSTANCES

Plaintiffs[1] initiated a class action[2] alleging that a system of at-large elections[3] was maintained in Burke County, Georgia,[4] for the purpose of diluting the significance of the votes of the class[5] in violation of the first,[6] fourteenth,[7] and fifteenth amendments,[8] as well as section 2 of the Voting Rights Act of 1965.[9] Plaintiffs sought to have this system replaced with a single-member district election scheme.[10] Defendants contended that the proof was insufficient to establish the required discriminatory intent.[11] The district court[12] found for the plaintiffs and entered an order requiring the county to implement the plaintiffs' proposed election scheme.[13] On appeal, the Court of Appeals for the Fifth Circuit, *held,* affirmed. An independent inquiry into the totality of the circumstances may be sufficient to give rise to an inference that an at-large election scheme is being maintained for a discriminatory purpose. *Lodge v. Buxton,* 639 F.2d 1358 (5th Cir.), *cert. granted sub nom. Rogers v. Lodge,* 50 U.S.L.W. 3212 (1981).

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[1] Plaintiffs were representatives of all black residents of Burke County, Georgia. Lodge v. Buxton, 639 F.2d 1358, 1361 (5th Cir.), *cert. granted sub nom.* Rogers v. Lodge, 50 U.S.L.W. 3212 (1981).

[2] Under rule 23 of the Federal Rules of Civil Procedure, a plaintiff is permitted to file suit on behalf of himself and other members of a defined class. Prerequisites of a class action include: (1) the members of a class being so numerous as to make joinder impracticable; (2) questions of law or fact common to the class; (3) claims or defenses of the representative party that are typical of the claims or defenses of the class; and (4) fair and adequate protection of the interests of the class by the representative parties. FED. R. CIV. P. 23(a). *See generally* J. MOORE, A. VESTAL & P. KURLAND, 1 MOORE'S MANUAL, FEDERAL PRACTICE AND PROCEDURE § 14.07[1] (1962).

[3] An at-large election system is one in which the entire governmental unit functions as an electoral district. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation,* 1976 ARIZ. ST. L.J. 277, 280 n.19. The election scheme in dispute concerned the at-large election of county commissioners. 639 F.2d at 1375. This note will use the terms "at-large district" and "multi-member district" interchangeably.

[4] 639 F.2d at 1361. Burke County, Georgia, is the second largest of Georgia's 159 counties in terms of area. A slight majority of the county's population of over 10,000 is black. The county is predominantly rural and its economic base is primarily agricultural. *Id.*

[5] *Id.*

[6] U.S. CONST. amend. I. The court did not reach the plaintiffs' first amendment claim. 639 F.2d at 1364 n.11.

[7] U.S. CONST. amend. XIV, § 1 declares that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

[8] "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

[9] 42 U.S.C. § 1973 (Supp. III 1979). The court held this claim was not applicable to voting dilution cases. 639 F.2d at 1364 n.11. The plaintiffs also contended that the election scheme in question was in violation of 42 U.S.C. § 1971 (Supp. III 1979). The court, however, expressed no opinion on the applicability of this statute to the present case. 639 F.2d at 1364 n.11.

The concept of representative government requires that each citizen have an equally effective voice in the election of representatives.[14] Thus, an election system that serves to dilute the strength of a person's

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[10] Single-member districts are governmental units that elect one representative to the legislative body. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation,* 120 U. PA. L. REV. 666, 670 n.23 (1972). Both plaintiffs and defendants submitted proposed election schemes to the court. 639 F.2d at 1381; *see* note 15 *infra.*

[11] 639 F.2d at 1362; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (at-large election schemes must be shown to be maintained for purpose of discriminatory vote dilution as prerequisite of constitutional invalidity).

[12] Plaintiffs instituted this action in the United States District Court for the Southern District of Georgia. 639 F.2d at 1360.

[13] The proposed scheme consisted of five single-member districts to be apportioned as follows:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	−1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	−1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

Id. at 1361-62 n.4.

[14] Reynolds v. Sims, 377 U.S. 533, 565 (1964); *see* Gray v. Sanders, 372 U.S. 368, 381 (1963) (local governments cannot violate principle of one man, one vote).

vote may be held invalid.[15] The dilution of a vote may be accomplished in several ways. First, a governmental unit may apportion the boundaries of single-member districts in such a manner as to provide for the election of representatives by unequal numbers of voters.[16] A governmental unit may also apportion its boundaries in such a manner as to exclude certain classes of people[17] or submerge the votes of minority groups in multi-member or at-large districts.[18] Although multi-member districts are the traditional method of representation in both England and the United States,[19] this method has been the subject of much criticism.[20]

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[15] *See, e.g.*, Louisiana v. United States, 380 U.S. 145, 154-55 (1965) (invidious use of literacy tests violates fifteenth amendment); Gomillion v. Lightfoot, 364 U.S. 339, 346 (1960) (racial gerrymandering gives rise to a cause of action under fifteenth amendment); Terry v. Adams, 345 U.S. 461, 470 (1953) (exclusion of blacks from party primaries is violative of fifteenth amendment); Guinn v. United States, 238 U.S. 347, 350 (1915) (Oklahoma's grandfather clause violative of fifteenth amendment).

[16] This is called quantitative dilution. The effect of this system is that the ballots cast by the voters are numerically unequal. *See* Note, *Discriminating Effect of Elections At-Large: The "Totality of Circumstances" Doctrine*, 41 ALB. L. REV. 363, 365-67 (1977) (discussing discriminatory effects of quantitative dilution); *cf.* Gaffney v. Cummings, 412 U.S. 735, 743 (1973) (states must apportion legislative districts with equal populations); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (both houses of state legislatures must be apportioned on an equal population basis).

[17] This is commonly called a gerrymander. *See* Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (municipalities cannot draw boundaries to exclude black citizens). *See generally* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. L. REV. 85, 86 (1979) (discussing history and effects of gerrymandering).

[18] This is called qualitative dilution. This type of district tends to subsume the votes of minorities within the votes of the majority, giving the minorities no effective voice in the election of representatives. *See* Note, *supra* note 16, at 367-73 (discriminatory effects of qualitative dilution).

[19] Multi-member districts have been used in the English and American political systems much longer than single-member districts. During the thirteenth century, each English shire, borough, or town elected two or three knights for shires, or burgesses for boroughs or towns, as representatives to Parliament. This system began as a solution to the problem of bandit-infested roads between the countryside and London. Two or three men afforded each other protection on the trips to and from Parliament. This English tradition is probably the reason why the London Company summoned two burgesses from each plantation to the opening of the Virginia House of Burgesses in 1619. Multi-member systems continued to be the dominant method of representation in the Colonies as well as under the new government. The first state to organize single-member districts was Vermont in 1785. Klain, *A New Look at the Constituencies: The Need for a Recount and a Reappraisal*, 49 AM. POL. SCI. REV. 1105, 1111-16 (1955).

[20] *See* Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 731-32 (1964) (multi-member districts require lengthy ballots and leave officials with no identifiable constituencies); Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120, 127-28 (1972) (multi-member districts give voters less control over more representatives);

Claims of vote dilution, however, were not considered justiciable prior to the 1962 United States Supreme Court decision in *Baker v. Carr.*[21] The *Baker* Court rejected the theory that vote dilution claims rested upon the guaranty clause[22] and, therefore, were not justiciable because they involved political questions.[23] Instead, the Court held that a claim arising from the use of an election scheme that debased the votes of citizens through malapportionment was justiciable under the fourteenth amendment.[24]

Two years later, in *Reynolds v. Sims,*[25] the United States Supreme Court held that the fourteenth amendment guaranteed that electoral districts would be apportioned on an equal population basis on the theory that voters of districts with smaller populations had a greater voice in political elections than did voters in the more populated districts.[26] Although dealing with quantitative dilution,[27] *Reynolds* recognized the inherent problems with multi-member districts.[28] The *Reynolds* Court, however, did not consider multi-member districts to be unconstitutional per se.[29]

Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering,* 44 MISS. L.J. 391, 401 (1973) (at-large districts are a subtle form of racial gerrymandering); Comment, *Effective Representation and Multimember Districts,* 68 MICH. L. REV. 1577, 1588 (1970) (multi-member districts thwart representation of small interest groups). *See generally* Berry & Dye, *supra* note 17, at 85-88 (at-large election schemes in cities discriminate against black citizens); Engstrom, *supra* note 3, at 280 (same).

[21] 369 U.S. 186 (1962).

[22] U.S. CONST. art. IV, § 4. This section states that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government."

[23] The political question doctrine stems from the concept of separation of powers. This doctrine applies only to the relationship between the United States Supreme Court and the federal government. 369 U.S. at 210. It does not render a claim nonjusticiable simply because it touches matters of state government. *Id.* at 229.

[24] *Id.* at 237.

[25] 377 U.S. 533 (1964).

[26] *Id.* at 577.

[27] *Id.* This case involved Alabama's failure to reapportion the legislative districts within the state. The plaintiffs contended that the failure to reapportion these districts had resulted in grossly disproportionate representation. It was alleged that between the years 1900 and 1962 population growth had been uneven, and therefore, the weight of the vote in some counties had been diluted. *Id.* at 540.

[28] *Id.* at 579 n.58. The Court did not mention any specific objections to the use of multi-member jurisdictions, but did recognize that potential problems were inherent in their use. *Id.*

[29] *See id.* at 567-68. Population is the controlling criterion in legislative apportionment cases. *Id.* The Court held that the equal protection clause requires that the seats in both houses of a bicameral legislature be apportioned on a population basis. *Id.* at 567. Some deviations are constitutionally permissible so long as they are based on legitimate

In 1971, the United States Supreme Court, in *Whitcomb v. Chavis,*[30] articulated several standards that successful challengers to multi-member districts would have to meet. First, challengers had the burden of proving that multi-member districts actually served to dilute the voting strength of racial or political elements.[31] Second, the Court stated that a challenger must prove that multi-member districts were "conceived or operated as purposeful devices to further racial or economic discrimination."[32] Finally, the Court held that a lack of proportional representation would not suffice as an indicator of invidious discrimination absent a showing that black residents of the district had less opportunity to participate in the political process than did other residents of the district.[33]

The standards set forth in *Whitcomb* were satisfied two years later in *White v. Regester.*[34] *White* was the first case to successfully challenge a system of multi-member districts. The plaintiff challenged a Texas reapportionment plan containing several multi-member districts that allegedly discriminated against blacks and Mexican-Americans in violation of the fourteenth amendment.[35] The plaintiff successfully proved that Texas had a history of official racial discrimination[36] and

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considerations incident to the effectuation of a rational state policy. *Id.* at 564. In White v. Regester, 412 U.S. 755 (1973), the Court stated that "under our cases, multimember districts are not per se unconstitutional, nor are they necessarily unconstitutional when used in combination with single member districts." *Id.* at 765; *cf.* Chapman v. Meier, 420 U.S. 1, 18, 26-27 (1975) (indicating a preference for single-member districts); Connor v. Johnson, 402 U.S. 690, 692 (1971) (same).

[30] 403 U.S. 124 (1971).

[31] *Id.* at 144; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plaintiff has burden of proof in vote dilution cases); White v. Regester, 412 U.S. 755, 766 (1973) (same).

[32] 403 U.S. at 149; *see* City of Mobile v. Bolden, 446 U.S. 55, 66 (1980) (plaintiff must demonstrate that election system is racially motivated); Nevett v. Sides, 571 F.2d 209, 217 (5th Cir. 1978) (same), *cert. denied,* 446 U.S. 951 (1980).

[33] 403 U.S. at 149; *see* City of Mobile v. Bolden, 446 U.S. 55, 68-69 (1980) (must show that process leading to nomination and election was not open equally to members of plaintiff's class); White v. Regester, 412 U.S. 755, 766 (1973) (same); Kirksey v. Board of Supervisors, 554 F.2d 139, 148 (5th Cir.) (same), *cert. denied,* 434 U.S. 968 (1977).

[34] 412 U.S. 755 (1973).

[35] *Id.* at 756.

[36] *Id.* at 766-67. The district court held that the past history of Texas was rife with official acts of discrimination. Graves v. Barnes, 343 F. Supp. 704, 725 (W.D. Tex. 1972), *rev'd sub nom.* White v. Regester, 412 U.S. 755 (1973). For examples of other cases involving discrimination in Texas, see Beal v. Holcombe, 193 F.2d 384, 388 (5th Cir. 1951) (city ordinance setting aside public parks for exclusive use of whites held unconstitutional); *In re* Gomez, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967) (state statute prohibiting interracial adoptions held unconstitutional); Strauss v. State, 76 Tex. Crim. 132, 173

that Texas state law required a majority vote as a prerequisite to nomination in a party primary.[37] These factors were not considered invidious in themselves, but they "enhanced" the opportunity for racial discrimination.[38] More importantly, the plaintiff demonstrated that blacks and Mexican-Americans in the district did not have access to the political process.[39] *White* indicated that lack of access to the political system was to be the touchstone of vote dilution cases.[40]

The Fifth Circuit purported to follow the *White* criteria in *Zimmer v. McKeithen.*[41] The *Zimmer* court, however, found no direct evidence that blacks were limited in their access to the political system. Instead, the court relied solely upon evidence of past discrimination to sustain the challenge.[42] The theory the *Zimmer* court used was that an

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S.W. 663, 665-66 (1915) (upholding constitutionality of city ordinance forbidding sexual intercourse between blacks and whites).

[37] 412 U.S. at 766. A majority vote requirement, by definition, impedes the ability of minority groups to elect representatives.

[38] *Id.*

[39] *Id.* at 767. The district court found that the slating process in the Texas district in question was controlled by the Dallas Committee for Responsible Government. The court further found that a successful campaign was extremely difficult without the support of the Committee. The Committee routinely slated candidates without the assistance of black community leaders. The Committee did not need black support and did not seek it. Racial tactics were also used to discourage candidates who had black support. Graves v. Barnes, 343 F. Supp. 704, 726-27 (W.D. Tex. 1972), *rev'd sub nom.* White v. Regester, 412 U.S. 755 (1973).

[40] Indeed, the requirement that a plaintiff show that he and the members of his class lack access to the political system is the only evidentiary factor that is not related to effect. Although the Court will consider such factors as past discrimination and the unresponsiveness of legislators, these factors are nothing more than the result of the discriminatory impact of the electoral system. Thus, the Court is indicating that evidence of effect will be considered in determining discriminatory purpose. On the other hand, a showing that the plaintiff lacks access to the political process is indicative of something more than effect, since it guarantees that he will have no effective voice in the election process. *See* City of Mobile v. Bolden, 446 U.S. 55, 73-74 (1980) (criticizing the court of appeals' reliance on history, the lack of proportional representation, and the unresponsiveness of elected officials for purposes of showing discriminatory intent). *See generally* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis,* 76 MICH. L. REV. 694, 731 (1978) (discussing the impact of multi-member districts on minority groups).

[41] 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).

[42] 485 F.2d at 1301. The court found evidence of past racial discrimination in the form of segregated school systems, the interpretation tests as a prerequisite to vote, and the inability of blacks to register to vote in the district prior to 1962. *Id.; see, e.g.,* Louisiana v. United States, 380 U.S. 145, 151 (1965) (interpretation test is unconstitutional as a device to deprive blacks of the right to vote); Orleans Parish School Bd. v. Bush, 242

aggregate of the factors would be sufficient to show vote dilution.[43]

Whitcomb, White, and *Zimmer* all contained language that indicated that a showing of discriminatory purpose was required in vote dilution cases.[44] This requirement, however, was not considered significant[45] until the Supreme Court's decision in *Washington v. Davis.*[46] *Washington* was the first case to state specifically that under the equal protection clause of the fourteenth amendment a plaintiff must prove discriminatory purpose as well as effect.[47] Discriminatory intent does not have to be the dominant or primary motivation upon which a law rests.[48] Rather, determination of discriminatory intent requires inquiry into both circumstantial and direct evidence of purpose.[49]

F.2d 156, 166 (5th Cir. 1957) (segregated schools are unconstitutional).

[43] 485 F.2d at 1305; *see* Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 255 (5th Cir. 1978) (intent inferred from an aggregate of factors); Bolden v. City of Mobile, 571 F.2d 238, 245-46 (5th Cir. 1978) (same), *rev'd,* 446 U.S. 55 (1980); Nevett v. Sides, 571 F.2d 209, 224 (5th Cir. 1978) (same), *cert. denied,* 446 U.S. 951 (1980); Ferguson v. Winn Parish Police Jury, 528 F.2d 592, 599 (5th Cir. 1976) (dilution of black votes established by aggregate of factors).

[44] White v. Regester, 412 U.S. at 769; Whitcomb v. Chavis, 403 U.S. at 149; Zimmer v. McKeithen, 485 F.2d at 1304. *But see* City of Mobile v. Bolden, 446 U.S. 55, 107-09 (1980) (Marshall, J., dissenting) (vote dilution claims have never required a showing of discriminatory purpose); Burns v. Richardson, 384 U.S. 73, 88 (1966) (designed to have or had a discriminatory effect); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (designedly or otherwise discriminates against minorities).

[45] This is evidenced by the fact that many of the lower courts purported to require a showing of intent but invalidated election systems solely on evidence of effect. *See, e.g.,* Stewart v. Waller, 404 F. Supp. 206, 214 (N.D. Miss. 1975) (state law requiring at-large elections at the municipal level unconstitutional because the effects of the law were foreseeable).

[46] 426 U.S. 229 (1976).

[47] *Id.* at 238-39. *Washington* involved a challenge by blacks to a written personnel test that was a prerequisite to entering the Washington, D.C., police training program. The plaintiffs contended that the test discriminated against blacks because the percentage of black officers who failed the test was much higher than the percentage of white officers who failed. *Id.* at 232-33. The Court held that equal protection claims of racial discrimination required proof of discriminatory purpose. *Id.* at 238-39.

[48] *Id.* at 241.

[49] The complexity of determining discriminatory purpose lies in the fact that there seldom will be any direct evidence as to illicit motivation. It would be rare that an official would testify to the fact that he intended for a law to be discriminatory. *But cf.* Resident Advisory Bd. v. Rizzo, 564 F.2d 126, 142, 144 (3d Cir. 1977) (city mayor stated that he opposed placing black housing in white neighborhoods), *cert. denied,* 435 U.S. 908 (1978); Armstrong v. O'Connell, 451 F. Supp. 817, 826-27 (E.D. Wis. 1978) (school board official testified that school board was opposed to any form of integration); Mieth v. Dothard, 418 F. Supp. 1169, 1180 (M.D. Ala. 1976) (director of state highway department testified that certain physical requirements for state troopers were intended to be discriminatory in order to prevent women from holding a dangerous job). Evidence in

Most vote dilution cases prior to *Washington* were based on fourteenth amendment claims.[50] The courts, however, had not been entirely clear whether these cases rested upon the equal protection clause or upon a fundamental right to vote that was derived from the fourteenth amendment.[51] Indeed, this distinction had not been necessary prior to *Washington.* After *Washington,* the distinction represented a significant difference in the burden that the plaintiff must satisfy in order to succeed. This difference results from the fact that infringements on fundamental interests have traditionally required only a showing of effect.[52] Past vote dilution cases that involve black plaintiffs further complicate this problem since the claim could easily involve more than one constitutional infringement.[53] If a plaintiff could show that a multi-member district served to dilute the weight of his ballot in violation of his fundamental right to vote, then he would be successful without having to prove discriminatory motivation.[54]

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vote dilution cases will almost always be circumstantial. *See generally* Note, *Discriminatory Purpose and Disproportionate Impact: An Assessment After Feeny,* 79 COLO. L. REV. 1376, 1404-13 (1979) (discussion of direct and objective evidence as proof of discriminatory purpose).

[50] *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 537 (1964) (vote dilution violative of the fourteenth amendment); Wesberry v. Sanders, 376 U.S. 1, 3 (1964) (same); Gray v. Sanders, 372 U.S. 368, 370 (1963) (same).

[51] The right to vote has long been considered fundamental. *See* Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (right to vote is fundamental). The early vote dilution cases expressly recognized this right. *E.g.,* Reynolds v. Sims, 377 U.S. 533, 554 (1964) (there is a fundamental right to vote). The early cases also seemed to view vote dilution as an equal protection problem. *E.g., id.* at 568 (right to vote unconstitutionally impaired when weight of vote is diluted compared with weight of votes in other areas of state). This distinction became further confused when black plaintiffs were involved, since either constitutional standard could apply. *See generally* City of Mobile v. Bolden, 446 U.S. 55, 115-22 (1980) (Marshall, J., dissenting) (arguing vote dilution cases should be viewed as infringements on fundamental rights).

[52] The equal protection clause prohibits state action that discriminates against suspect classes, such as racial groups, or infringes on a fundamental right. Although evidence of intent is required in cases dealing with suspect classes, no proof of intent has been required in fundamental right cases. This is a result of the change of focus from the irrationality of laws that discriminate against people because of the color of their skin, to the infringement of a constitutionally guaranteed right possessed by most citizens. *See* Note, *supra* note 40, at 720-22 (equal protection clause protects both suspect classes and fundamental rights, but requirements of proof are different).

[53] In vote dilution cases with black plaintiffs, the court can focus on either the discrimination against of a suspect class or the infringement of the fundamental right to vote. *See* City of Mobile v. Bolden, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting) (suggesting that the plurality confused the issues because the plaintiffs were black).

[54] *Compare* White v. Regester, 412 U.S. 755, 765 (1973) (vote dilution in multimember district) *and* Whitcomb v. Chavis, 403 U.S. 124, 128-29 (1971) (same) *with*

This distinction was clarified by the United States Supreme Court in *City of Mobile v. Bolden.*[55] *Bolden* involved a challenge to Mobile's at-large system of electing city council members. Mobile's city government, in existence since 1911, consisted of a three-member city commission that combined the legislative and administrative functions.[56] The plaintiffs[57] contended that this at-large system served to submerge the effect of black votes and denied blacks an effective voice in city government. The plaintiffs alleged that this system violated their rights under the fourteenth and fifteenth amendments, as well as section 2 of the Voting Rights Act of 1965.[58] The plurality opinion[59] held that vote dilution claims were controlled by the equal protection clause of the fourteenth amendment[60] and, therefore, required proof that the election system was created or maintained for discriminatory purposes.[61] The plurality also held that the fifteenth amendment did not apply to vote dilution claims.[62] This position, however, was not

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Dunn v. Blumstein, 405 U.S. 330, 334, 360 (1972) (residency requirement before person can be eligible to vote held unconstitutional because of infringement on the fundamental right to travel) *and* Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 670 (1966) (Court invalidated a poll tax as an infringement on the right to vote). *See* note 52, *supra.* The problem with this argument is that at-large election schemes do not cause mathematical dilution of the weight of each voter's ballot. It is readily ascertainable that in an at-large district each vote is equal to every other vote. The basic problem lies in the fact that minorities in at-large systems have a smaller probability of electing their own representatives because the minorities simply do not have enough votes to win a majority. Thus, there is no direct interference with the weight of each voter's ballot.

[55] 446 U.S. 55 (1980).

[56] *Id.* at 59.

[57] This was a class action suit for the benefit of the black citizens of Mobile, Alabama. *Id.* at 58. Approximately 35.4% of Mobile's citizens were black. *Id.* at 58 n.1.

[58] *Id.* at 58. Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1976) states:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

[59] The plurality opinion was written by Justice Stewart, who was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist. 446 U.S. at 65.

[60] *Id.*

[61] *Id.* at 66.

[62] *Id.* at 65. The plurality held that the fifteenth amendment protected only against "purposefully discriminatory denial or abridgement by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' " *Id. But see* Nevett v. Sides, 571 F.2d 209, 220 (5th Cir. 1978) (holding that the fifteenth amendment is applicable to vote dilution cases), *cert. denied,* 446 U.S. 951 (1980); Stewart v. Waller, 404 F. Supp. 206, 215 (N.D. Miss. 1975) (same).

supported by a majority of the Court.[63] Further, the plurality held that the plaintiffs' statutory claims added nothing to the case.[64] Concerning the sufficiency of proof, the plurality held that the plaintiffs had failed to show that the election system in Mobile had been created or maintained for discriminatory purposes.[65] Further, the plurality severely criticized the Fifth Circuit's use of the *Zimmer* criteria.[66] The criteria enumerated in *Zimmer* was held to be indicative of discriminatory purpose but clearly insufficient to warrant a finding of unconstitutionality.[67] The plurality further stated that evidence of a history of past official discrimination cannot be treated "in the manner of original sin."[68] The plurality also criticized the lower court's heavy reliance on economic and social factors in its determination of discriminatory intent.[69] Evidence of lack of responsiveness of elected officials was held to be relevant only as to those officials who were responsible for the creation or maintenance of the electoral system or to those who were responsible for impeding the plaintiffs' access to the political system.[70] A successful challenge to the submergence of a minority's votes in an at-large election system should include proof that the minority was effectively precluded from participation in the political system.[71]

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[63] 446 U.S. at 125 n.24; *see* notes 73, 84 and 87 and accompanying text *infra.*

[64] The Court stated that § 2 of the Voting Rights Act of 1965 was merely a statutory version of the fifteenth amendment. Therefore, it added nothing to the plaintiffs' fifteenth amendment claim. 446 U.S. at 61.

[65] *Id.* at 72-74. Mobile's form of municipal government was established in 1911. This was at a time when blacks were disenfranchised. Thus, it cannot be said that Mobile's form of municipal government was created for the purpose of diluting black voting strength. Proof that the at-large method of city elections was being maintained for the purpose of diluting black votes, however, would be sufficient to hold the election system invalid. *Id.; see, e.g.,* Nevett v. Sides, 571 F.2d 209, 222 (5th Cir. 1978) (although the election scheme in question was enacted at a time when blacks were disenfranchised, it could be successfully proven that the election system was maintained for a discriminatory purpose), *cert. denied,* 446 U.S. 951 (1980).

[66] 446 U.S. at 73. The *Zimmer* criteria include: "[1] the group's accessibility to political processes, [2] the responsiveness of representatives to the needs of the group, [3] the weight of the state policy behind at-large districting, and [4] the effect of past discrimination upon the electoral participation of the group." Zimmer v. McKeithen, 485 F.2d at 1305. The aggregate of these factors would be considered sufficient to raise an inference of discriminatory intent. Bolden v. City of Mobile, 571 F.2d at 242-43 n.5.

[67] 446 U.S. at 73.

[68] *Id.* at 74.

[69] *Id.* at 75 n.22. The Court stated that "gauzy sociological considerations have no constitutional basis." *Id.*

[70] *Id.* at 74 n.20.

[71] *Id.* at 74 nn.20 & 21. The Court found that there was no proof of any direct interference in the plaintiff class's participation in the political process. In fact, there

Justice Blackmun concurred only in the plurality's result,[72] and never reached the question of the application of the intent requirement to vote dilution cases.[73] Justice Blackmun contended, however, that the total abolition of Mobile's long-established form of city government was beyond the bounds of sound judicial discretion.[74]

Justice Stevens' concurrence indicated that he agreed with the plurality's conclusion that the requisite intent had not been sufficiently proven,[75] but disagreed with the reasoning used by the plurality in reaching its conclusion.[76] Justice Stevens stated that vote dilution cases should be divided into two categories.[77] The first category should include those cases that deal with the direct interference by the state with the right to vote.[78] Cases falling within this category should be tested by the most stringent standards.[79] The second category should include those cases that concern state action that affect the political strength of various groups.[80] Cases falling within this category should require a showing of discriminatory intent.[81] Justice Stevens reasoned that a determination of discriminatory intent should be predicated upon the objective intent of the decisionmaker rather than the subjective intent as proposed by the plurality.[82]

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was proof that black voters had the only slating organization in Mobile. *Id.* at 73.

[72] *Id.* at 80.

[73] *Id.* Justice Blackmun failed to discuss this issue. He indicated, however, that even if intent were a prerequisite to relief in vote dilution cases, he would agree with Justice White's dissent because the district court's findings amply supported an inference of discriminatory intent. *See* Bolden v. City of Mobile, 423 F. Supp. 384, 387-94 (S.D. Ala. 1976) (district court's findings of fact on question of discriminatory intent), *aff'd,* 571 F.2d 238 (5th Cir. 1978), *rev'd,* 446 U.S. 55 (1980).

[74] 446 U.S. at 80; *see* 423 F. Supp. at 404 (requiring Mobile to abandon its commission form of government and to adopt a mayoral system and a nine-member city council to be elected from single-member districts).

[75] 446 U.S. at 83.

[76] *Id.* at 85, 86.

[77] *Id.* at 83.

[78] *Id.* This would include such practices as poll taxes, literacy tests, or the reduction in the significance of a voter's ballot because of quantitative dilution. *Id.; see* notes 14 through 16 and accompanying text *supra.*

[79] 446 U.S. at 84.

[80] *Id.* at 83-84. This would include cases involving gerrymandering and the discriminatory use of multi-member or at-large voting districts. *See generally* Berry & Dye, *supra* note 17, at 86 n.7 (stating that multi-member districts are sometimes called institutional gerrymandering).

[81] 446 U.S. at 90.

[82] *Id.* Justice Stevens proposed a three-part standard that included: (1) a determination that the election system was manifestly not the product of a routine or traditional political system, (2) that the election system had a significant adverse impact on a mi-

Justice White, in his dissent, reasoned that sufficient evidence of discriminatory intent had been shown.[83] Further, Justice White concluded that multi-member election systems could be challenged under the fourteenth and fifteenth amendments.[84]

In a lengthy dissent, Justice Marshall concluded that past vote dilution cases had not required a showing of discriminatory intent.[85] He also argued that vote dilution claims should be viewed as a fundamental right issue rather than an issue involving a suspect class,[86] and that, further, multi-member election districts could be challenged under the fifteenth amendment.[87] Finally, Justice Marshall argued that discriminatory intent, if it were required, should be based upon a foreseeability standard.[88]

Shortly after the *Bolden* decision, a three-judge panel of the Fifth Circuit ruled on yet another challenge to at-large election systems in *McMillan v. Escambia County.*[89] *McMillan* combined challenges to the at-large elections of the Escambia County Commission and School Board, as well as the Pensacola City Council.[90] After expressing concern over the lack of clarity in the *Bolden* decision,[91] the *McMillan* court proceeded to adopt the plurality opinion of *Bolden* in its entirety.[92] Thus, although the *McMillan* plaintiffs alleged violations of the Civil Rights Acts of 1871[93] and 1957[94] and the Voting Rights Act of

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nority group, and (3) that the election system was maintained for either totally irrational purposes or entirely motivated by a desire to limit the political strength of the minority. *Id.*

[83] *Id.* at 102-03. Justice White stated that all the factors that had been present in *White* were present in the instant case. These factors included a lack of minority access to the candidate selection process, the unresponsiveness of elected officials to minority groups, and a history of discrimination. *Id.* at 101.

[84] *Id.* at 103; *see* note 44 and accompanying text *supra.*

[85] 446 U.S. at 107-08; *see* note 44 and accompanying text *supra.*

[86] 446 U.S. at 120; *see* note 51 and accompanying text *supra.*

[87] 446 U.S. at 126-29.

[88] *Id.* at 137. Justice Marshall reasoned that the common law foreseeability test would charge governmental units with the foreseeable consequences of their acts. Thus, there would be a strong inference that the discriminatory effects were desired. *Id.*

[89] 638 F.2d 1239 (5th Cir. 1981). This case came before Judges Coleman, Peck, and Kravitch. *Lodge* was decided by Judges Jones, Fay, and Henderson. This is significant because *Lodge* was decided within a month of *McMillan,* yet neither case mentioned the other.

[90] *Id.* at 1240.

[91] *Id.* at 1242.

[92] *Id.* at 1243.

[93] 42 U.S.C. § 1983 (Supp. III 1979).

[94] *Id.* § 1971(a)(1).

1965,[95] as well as violations of the fourteenth and fifteenth amendments, the court considered only the fourteenth amendment claim to be justiciable.[96]

The court then turned to the question of determining discriminatory intent and enumerated the factors it considered important.[97] The court, however, did not mention whether accessibility to the political process should be considered. Further, the court did not state whether any one of the evidentiary factors or the totality was sufficient to determine discriminatory intent.

Although these omissions threaten the precedential value of *McMillan*,[98] they did not affect the conclusions reached by the court for two reasons. First, the court upheld the at-large election of county commissioners simply because there was no evidence of discriminatory intent.[99] Therefore, it would have been useless to have considered the various evidentiary factors which might have been involved. Second, the court invalidated the at-large elections of school board and city council members because the election schemes were clearly *conceived* for invidious purposes.[100] Thus, the court did not have to draw inferences as to the motivation for the maintenance of the existing election systems.

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[95] *Id.* § 1973.

[96] 638 F.2d at 1243 n.9. This position is contrary to the *Lodge* court's holding on the applicability of fifteenth amendment claims to vote dilution cases. *See* note 102 *infra.*

[97] 638 F.2d at 1243. The factors enumerated by the court included: (1) the historical background of the action, (2) the specific order of events, (3) procedural departures from the usual procedural sequence, (4) substantive departures from the usual procedural sequence, and (5) the legislative history of the decision-making body. *See* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252, 267-68 (1977) (historical background of decision as evidentiary source).

[98] These factors have played an important and recurring role in vote dilution cases. *See* notes 33, 39, 40, 71 and accompanying text *supra.* Total exclusion of these factors from discussion seriously weakens future reliance on *McMillan.*

[99] 638 F.2d at 1245. The only evidence of disriminatory intent submitted at trial was that the county commissioners maintained the at-large election in order to retain their incumbency. *Id.* at 1244. The court held that the desire to retain one's incumbency, unaccompanied by evidence of any other motive, was not evidence of discriminatory intent. *Id.* at 1245.

[100] *Id.* at 1248. The distinguishing factor between *McMillan* and *Bolden* is that *McMillan* involved an election system that was created for discriminatory purposes. *Id.* On the other hand, *Bolden* involved an election system that was created for a neutral reason but was challenged as being maintained for a discriminatory purpose. *See* note 65 *supra. McMillan* also differs from *Bolden* because there was testimony by public officials regarding the motivation for the implementation of the at-large election systems. *See* 638 F.2d at 1247. This type of direct evidence was not present in *Bolden.* Direct evidence of discriminatory motivation logically reduces the need to draw inferences from circumstantial evidence.

In the instant case, the court reasoned that since the plaintiffs' action was predicated upon fourteenth and fifteenth amendment claims, the case was controlled[101] by the criteria set forth in *City of Mobile v. Bolden*.[102] Further, since the county commissioners were unresponsive to the particular needs of the plaintiffs,[103] and since the depressed socio-economic status[104] of the plaintiffs' combined with past[105] and present[106] official discriminatory actions served to impair the plaintiffs' access to the political process,[107] and since these factors were enhanced by additional characteristics[108] of the district, the court concluded the totality of the circumstances was sufficient to establish an inference of discriminatory intent.[109]

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[101] 639 F.2d at 1376.

[102] *Id.* at 1363. The court concluded that the fifteenth amendment was applicable to vote dilution cases, since the majority of the Justices on the *Bolden* Court agreed that it should be construed broadly enough to encompass this type of case. The court held this to be the law despite the plurality's narrow construction of the amendment. *Id.* at 1372; *see* notes 55 through 62 and accompanying text *supra*.

[103] 639 F.2d at 1376. The unresponsiveness of the county commissioners to the needs of the class was demonstrated by the following: (1) allowing some blacks to be educated in largely segregated and inferior schools, (2) the token number of blacks who were hired by the county and the fact that they were being paid lower salaries than their white counterparts, (3) the appointment of relatively few blacks to boards and committees that oversee county government, (4) the failure to appoint any blacks to the judge-selection committee, (5) making road paving decisions in a manner that ignored the needs of black citizens, (6) forcing blacks to seek the aid of the courts in order to assert their rights to integrated schools, grand juries, and to register and vote without interference, and (7) contributing public funds to private schools in an effort to circumvent the requirements of integration. *Id.* at 1376-77.

[104] *Id.* at 1378. The court determined that the proportionally high poverty level of blacks in Burke county combined with their lack of education caused partially by past discrimination, had a negative impact on the blacks' ability to participate in the electoral process. *Id.* at 1378-79. The court reasoned that the deep-rooted discrimination in the South would further erode the practicality of electoral participation because county-wide campaigning by blacks would be effectively precluded by social stigma and racial tension. Further, the local Democratic Executive Committee had only one black member. The district court found that successful campaigning could come only through cooperation with this group. Thus, black participation in the political process was effectively precluded.

[105] *Id.* at 1378. The court determined that past discrimination caused black suffrage to be virtually nonexistent, produced bloc voting by whites, and led to inadequate and unequal educational opportunities for blacks that had a *present* effect on their ability to gain access to the political system. *Id.* at 1377-78.

[106] *Id.* at 1379. Under state law, maintenance of the election system was to be determined by the local district. GA. CODE ANN. § 34-702 (1980). The court found that white elected officials maintained the election system so as to minimize the ability of blacks to participate in the political process. 639 F.2d at 1379.

[107] 639 F.2d at 1379.

[108] *Id.* at 1380. The court found that the following factors enhanced the opportunity

In his dissent, Judge Henderson concluded that since the *Bolden* Court had disfavored heavy reliance on such factors as historical discrimination and sociological considerations,[110] and since the district court had given these factors equal weight in its determination,[111] the case should be remanded for consideration[112] under the *Bolden* criteria.[113]

The instant case places heavy reliance upon the recent *Bolden* decision.[114] The precedential value of *Bolden,* however, is severely impaired by the philosophical and legal differences among the Justices.[115] The number of opinions written in *Bolden* clearly emphasizes the complexity involved in cases dealing with the discriminatory effects of multi-member or at-large election systems. Thus, the *Bolden* decision leaves the lower courts with little guidance in a very complex area of constitutional law.

The Fifth Circuit's attempt in the instant case to reconcile *Bolden* with the previous cases dealing with multi-member districts[116] underscores the need for precise judicial guidelines in this important area. For instance, *Lodge* placed a great deal of weight upon evidence indicating discriminatory effect in its inquiry into discriminatory intent.[117] This is clearly inconsistent with *Bolden.*[118]

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to use an electoral process for invidious purposes: (1) Burke County, Georgia, is nearly two-thirds the size of the entire state of Rhode Island, (2) GA. CODE ANN. § 34-1513 (1980) provides that a candidate for political office in Georgia must receive a majority of the votes cast in order to be elected, and (3) there is no residency requirement for those seeking office. 639 F.2d at 1380.

[109] 639 F.2d at 1380.

[110] *Id.* at 1382 (citing City of Mobile v. Bolden, 446 U.S. 55, 74 (1980)).

[111] 639 F.2d at 1382.

[112] *Id.*

[113] *Id.* at 1381. Judge Henderson further reasoned that since majority rule was the essence of a democratic system and since all at-large election systems will invariably disadvantage minority groups, the court should require conclusive evidence of discriminatory intent. *Id.*

[114] *Id.* at 1363.

[115] *See* notes 73 through 87 and accompanying text *supra.*

[116] 639 F.2d at 1372-75.

[117] The court held that proof of unresponsiveness of elected officials was essential to prove discriminatory intent. *Id.* at 1375. The court also placed heavy reliance on past discrimination and socio-economic factors. *Id.* at 1376-80.

[118] *See* City of Mobile v. Bolden, 446 U.S. at 74 (stating that the unresponsiveness of elected officials is, at best, tenuous and circumstantial in proving discriminatory intent). The *Bolden* Court also specifically criticized lower courts' reliance on such factors

Lodge recognized, however, that the plaintiffs adequately proved that blacks in Burke County, Georgia, lacked access to the political system.[119] Thus, despite the misplaced emphasis on tangential factors, *Lodge* appears to meet the standards articulated by the plurality in *Bolden.*

Although *Lodge* may have reached the correct conclusion, the court's reasoning could lead lower courts to place reliance upon the same factors that were criticized in *Bolden.*[120] Clearly, there is a need for judicial guidance in this area of the law.[121]

The need for clarity in determining discriminatory intent in multi-member or at-large election system cases lends strength to the subjective test proposed by Justice Stevens in his concurrence in *Bolden.*[122] Justice Stevens' test would require that the plaintiff prove that the decision to create or to maintain the multi-member or at-large election scheme was manifestly a product of a routine political decision,[123] that the election system had a significant adverse impact upon the minority group,[124] and that the election system was maintained for either totally irrational purposes or entirely motivated by a desire to limit the political strength of the minority.[125] This standard is clear and concise and

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as past history of discrimination and socio-economic conditions. *See* notes 68 and 69 *supra.*

[119] *See* note 78 and accompanying text *supra.*

[120] *See* notes 104 and 105 *supra.*

[121] The need for clear judicial standards is highlighted by two district court opinions decided subsequent to *Lodge,* in which, on facts almost identical to *Lodge,* two different conclusions were reached. In Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981), the district court, relying on *Lodge,* held an at-large method of election invalid based on the "totality of the circumstances." *Id.* at 462. Even though the court found that blacks lacked access to the political process, it is clear that the court gave great weight to such factors as past discrimination. *Id.* at 460-62. On the other hand, the district court, in Perkins v. City of West Helena, 514 F. Supp. 770 (E.D. Ark. 1981), relying on the *Bolden* opinion, upheld an at-large election system on the ground that there was no showing of discriminatory intent. *Id.* at 782. The court specifically found that "no group is denied access to the political system." *Id.* at 781. The court further noted that it must not place heavy reliance on the state's past history of discrimination. *Id.*

Both cases may be viewed as correct. The divergent holdings can be explained by the courts' application of differing interpretations of the *Bolden* standards. Had the standards that each court employed been reversed, the results of the cases could conceivably have been different.

[122] *See* note 82 *supra.*

[123] *Cf.* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (stating that laws that are normally lawful become unlawful when passed to attain an unlawful end); United States v. Reading Co., 226 U.S. 324, 357 (1912) (same).

[124] *See* note 31 *supra.*

[125] *See* note 52 *supra.*

could be applied easily by the lower courts.

The dissent in *Lodge* pointed out that all at-large election systems will disadvantage one or more minority groups.[126] It has been consistently held, however, that multi-member election systems are not unconstitutional per se[127] since multi-member districts do not mathematically dilute the vote of the individual.[128] Each vote is given the same weight.[129] Although there is no constitutional guarantee of proportional representation,[130] the idea that an election system was purposefully created or maintained to deprive minority groups of representation in government is repugnant to the spirit of the Constitution.

The *Lodge* dissent also recognized that the majority's test for determining discriminatory intent is unworkable because it does not allow the political process to function effectively.[131] Indeed, the *Lodge* court's heavy reliance upon evidence of discriminatory effect in order to prove discriminatory motivation could place most multi-member and at-large election systems in jeopardy.[132] Therefore, the challenge before the courts is to clarify the standard to be used by the trial courts in determining the requisite discriminatory intent.

W. Thomas Siler, Jr.

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[126] 639 F.2d at 1382.

[127] *See* note 29 and accompanying text *supra*.

[128] *See* note 54 *supra*.

[129] *See* note 54 *supra*.

[130] City of Mobile v. Bolden, 446 U.S. at 66; White v. Regester, 412 U.S. at 765-66; Whitcomb v. Chavis, 403 U.S. at 149-50; *cf.* United Jewish Orgs. v. Carey, 403 U.S. 144, 166-67 (1977) (voter cannot complain merely because voting follows racial lines).

[131] 639 F.2d at 1382.

[132] Most at-large election systems will have some discriminatory impact on minority groups. *See* note 108 *supra*. Therefore, there will normally be evidence of discriminatory impact. If evidence of discriminatory impact receives the attention that the *Lodge* court placed on it, many at-large election schemes could be held unconstitutional.

CONSTITUTIONAL LAW—EQUAL PROTECTION—MALE ONLY DRAFT REGISTRATION DOES NOT VIOLATE THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

Plaintiffs[1] brought a class action suit[2] in the United States District Court for the Eastern District of Pennsylvania challenging the constitutionality of the registration provisions of the Military Selective Service Act of 1971 (MSSA).[3] Plaintiffs alleged that the exclusion of females from draft registration invidiously discriminated against males in violation of the equal protection component of the fifth amendment.[4] In response to plaintiffs' assertion that the intermediate scrutiny standard[5] was applicable, defendants[6] argued that the subject matter of the challenged legislation mandated extreme judicial defer-

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[1] The original complaint was filed in June, 1971 by four young men subject to registration and conscription. Three of the plaintiffs had not yet reached the age of 18 at the time the original action was filed; the fourth had already registered with the Selective Service System. Rowland v. Tarr, 341 F. Supp. 339, 340 (E.D. Pa. 1972), *aff'd in part and vacated in part per curiam,* 480 F.2d 545 (3d Cir. 1973).

In 1972, the district court denied the plaintiffs' application to convene a three-judge court on jurisdictional grounds and sustained the defendants' cross-motion to dismiss the complaint. 341 F. Supp. at 343. The court of appeals upheld the dismissal of all claims except that of unconstitutional gender-based discrimination. The court of appeals ordered the district court to determine the existence of the plaintiffs' standing to assert the claim and, also, to determine whether the claim warranted the convening of a three-judge panel. 480 F.2d at 546-47. On remand, the district court denied the defendants' motion to dismiss the case as moot, concluding that although authority to draft registrants had lapsed by 1973, the plaintiffs were still subject to criminal sanctions under the registration law. Rowland v. Tarr, 378 F. Supp. 766, 772 (E.D. Pa. 1974). The proceedings stalled, and in June, 1979, the district court proposed to dismiss the case because of the inaction of the parties. Following additional discovery, the defendants' motion to dismiss was denied. Goldberg v. Tarr, 510 F. Supp. 292, 297 (E.D. Pa. 1980).

Ultimately, the district court ruled that draft registration that excluded women was unconstitutional. Goldberg v. Rostker, 509 F. Supp. 586, 605 (E.D. Pa. 1980), *rev'd,* 101 S. Ct. 2646 (1981). The following day, Justice Brennan issued an order staying execution and enforcement of the district court's judgment. Rostker v. Goldberg, 448 U.S. 1306, 1311 (1980).

[2] Plaintiffs filed suit individually and as representatives of a class then subject to induction into the armed forces. On July 1, 1980, a plaintiff class was certified, consisting of "all male persons who are registered or subject to registration under 50 U.S.C. App. § 453 or are liable for training and service in the armed forces of the United States under 50 U.S.C. App. §§ 454, 456(h) and 467(c)." Goldberg v. Rostker, 509 F. Supp. 586, 588-89 (E.D. Pa. 1980), *rev'd,* 101 S. Ct. 2646 (1981). On July 18, 1980, the class was amended to include males "who are also either subject to registration under Presidential Proclamation No. 4771 (July 2, 1980) or are presently registered with the Selective Service System." 509 F. Supp. at 605.

[3] Rostker v. Goldberg, 101 S. Ct. 2646, 2650 (1981). The Military Selective Service Act of 1971, § 101, is codified at 50 U.S.C. App. §§ 451-473 (1976).

Congress is empowered by the United States Constitution "[t]o raise and support Armies," U.S. CONST. art. I, § 8, cl. 12, "[t]o provide and maintain a Navy," *id.* cl. 13, and "[t]o make Rules for the Government and Regulation of the land and naval Forces,"

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id. cl. 14. Pursuant to this grant of constitutional authority, Congress enacted the Military Selective Service Act (MSSA), which provides for selective service registration of every male citizen and male resident alien between the ages of 18 and 26. 50 U.S.C. app. § 453 (1976). The purpose of this registration is to facilitate conscription in the event of a national emergency. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 198 (Jan. 23, 1980). The MSSA renders those persons registered under the Act liable for training and service in the armed forces. 50 U.S.C. app. § 454(a) (1976).

The Act was amended to preclude conscription as of July 1, 1973. Act of Sept. 28, 1971, Pub. L. No. 92-129, § 101(a)(35), 85 Stat. 353 (codified at 50 U.S.C. app. § 467(c) (1976)). Thus, an actual draft would require congressional approval. Draft registration under § 453 was discontinued by President Ford in 1975. Presidential Proclamation No. 4360, 3 C.F.R. 462 (1971-1975 Compilation), *reprinted in* 50 U.S.C. app. § 453, at 1994 (1976) *and in* 89 Stat. 1255 (1975).

In early 1980, President Carter announced his decision to seek reactivation of registration following the invasion of Afghanistan by the Soviet Union. President's State of the Union Address, 16 WEEKLY COMP. OF PRES. DOC. 196-98 (Jan. 23, 1980). Actual conscription was not sought by the President, and therefore was not an issue in this litigation. The Selective Service System had been inactive since 1975, and funds were needed to reactivate registration; consequently, the President recommended that Congress transfer funds from the Department of Defense to the Selective Service System. SUPPLEMENTAL APPROPRIATIONS AND BUDGET AMENDMENTS, H.R. DOC. No. 267, 96th Cong., 2d Sess. 2 (1980). The President further recommended that Congress amend the MSSA to permit registration and conscription of women. PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM, H.R. DOC. No. 265, 96th Cong., 2d Sess. 10 (1980). The House of Representatives rejected the President's proposal to register women, 126 CONG. REC. H2752-53 (daily ed. April 22, 1980), and the Senate concurred. *Id.* S6773 (daily ed. June 12, 1980). Congress then allocated the necessary funds for registration of men. Act of June 27, 1980, Pub. L. No. 96-282, 94 Stat. 552.

The registration of 19 and 20 year old males was ordered by presidential proclamation on July 2, 1980 pursuant to authority conferred by the MSSA. Presidential Proclamation No. 4771, 3 C.F.R. 82 (1980).

[4] The fifth amendment provides that "no person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

The complaint filed in 1971 challenged the MSSA on several grounds in addition to that of unconstitutional gender-based discrimination. The plaintiffs contended that the Act amounted to a taking of property without due process of law, imposed involuntary servitude, violated rights of free expression and assembly, and was unlawfully implemented to advance an unconstitutional war. 101 S. Ct. at 2650 n.2.

[5] *See* notes 50 through 58 and accompanying text *infra.*

[6] Curtis Tarr was director of the Selective Service System and was a named defendant when the suit was filed in 1971. His successor, Bernard Rostker, was substituted as a defendant by stipulation of the parties. 509 F. Supp. at 588 n.1.

ence.[7] The district court ruled that the registration provisions of the MSSA created an unjustified gender-based classification and in so doing unconstitutionally discriminated between males and females.[8] On appeal, the United States Supreme Court, *held,* reversed. The requirement that only males register for possible conscription under the MSSA does not deprive males of their constitutional rights under the equal protection component of the fifth amendment. *Rostker v. Goldberg,* 101 S. Ct. 2646 (1981).

In the early years after its inception, the equal protection clause was not a favored method of invalidating state or federal legislation.[9] In fact, before the 1960's judicial intervention through invocation of equal protection mandates was virtually nonexistent outside racial discrimination cases.[10] Initially, the clause was held to apply exclusively to the protection of the negro race.[11] Between 1885 and 1937, the equal protection clause was used to determine whether legislative classifications were reasonably related to a legitimate governmental interest and were, therefore, constitutional.[12] After 1937, the Supreme Court adhered to a two-tier standard of review: (1) an extremely deferential standard with regard to social and economic legislation, known as the rational basis test,[13] and (2) the strict scrutiny standard, requiring that when a classification has been deemed "suspect"[14] or there has been an infringement of a fundamental right,[15] the legislation must be necessary to promote a compelling governmental interest.[16]

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[7] *See* notes 66 through 75 and accompanying text *infra.*

[8] 509 F. Supp. at 605.

[9] Justice Holmes once characterized the equal protection doctrine as "the usual last resort of constitutional arguments . . . ." Buck v. Bell, 274 U.S. 200, 208 (1927).

[10] *See, e.g.,* Nashville, C. & St. L. Ry. v. Browning, 310 U.S. 362, 368 (1940) (equal protection denied railroads); Davidson v. Board of Adm'rs, 97 U.S. 97, 106 (1878) (unequal taxation by the states not prohibited by equal protection clause).

[11] The Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872).

[12] *See, e.g.,* Reinman v. City of Little Rock, 237 U.S. 171, 177 (1915) (ordinance classifying livery stable as nuisance per se reasonably related to state's interest in regulating business); Powell v. Pennsylvania, 127 U.S. 678, 687 (1888) (law forbidding manufacture of oleomargerine was applied equally to all similar manufacturers and was reasonably related to the protection of public health); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885) (prohibiting washing and ironing in public laundries during certain hours was within police power).

[13] The rational basis test looks to whether there is a legitimate state interest and whether the means to further the interest are rationally related to it: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." Williamson v. Lee Optical, 348 U.S. 483, 488 (1954) (approving a system of regulations forbidding certain opticians from fitting eyeglass lenses as being rationally related to promoting public health); Daniel v. Family Sec. Life Ins. Co., 336 U.S. 220, 221 n.1, 225 (1949) (prohibition of life insurance agents from serving as undertakers and undertakers from serving as life insurance agents was a reasonable regulation of business); Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552, 564 (1947) (state pilotage program reasonably related to ensuring river

The determinative question in modern equal protection cases, particularly those involving gender-based classifications, has been which standard of review to apply: rational basis, strict scrutiny, or something in between.[17] The pattern of review for gender-based classifica-

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safety).

In United States v. Carolene Prods. Co., 304 U.S. 144 (1938), the Court rejected a due process challenge to federal prohibitions on interstate shipments of "filled milk" as rationally related to promoting the public health. *Id.* at 147. In a footnote with significant implications in equal protection analysis, Justice Stone, writing for the majority, suggested that a stronger case for judicial intervention may exist in the regulation of matters other than commercial transactions. *Id.* at 152 n.4.

[14] The Supreme Court has ruled that certain classifications are inherently suspect, triggering application of the strict scrutiny standard of review. *See, e.g.,* Loving v. Virginia, 388 U.S. 1, 11 (1967) (race); Korematsu v. United States, 323 U.S. 214, 216 (1944) (national origin). *Compare* Foley v. Connelie, 435 U.S. 291, 296 (1978) (applying rational basis test in upholding state statute barring aliens from employment as state troopers) *with* Graham v. Richardson, 403 U.S. 365, 372 (1971) (strict scrutiny scope of review applied to invalidate state law denying welfare assistance to aliens).

The Court has specifically declined to apply strict scrutiny to other classifications. *See, e.g.,* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (age); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973) (wealth).

[15] The Supreme Court has determined that certain rights are fundamental and that restrictions placed upon these rights are subject to strict judicial scrutiny. *See, e.g.,* Roe v. Wade, 410 U.S. 113, 155 (1973) (rights of a uniquely private nature); Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (right of access to ballot); Loving v. Virginia, 388 U.S. 1, 12 (1967) (right to marry); United States v. Guest, 383 U.S. 745, 757-58 (1966) (right to interstate travel); Harper v. Virginia State Bd. of Elections, 383 U.S. 536, 552 (1966) (right to vote); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942) (right to procreate).

The Supreme Court has refused to declare certain other rights fundamental. *See, e.g.,* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 37 (1973) (right to an education); United States v. Kras, 409 U.S. 434, 445 (1973) (right to discharge in bankruptcy); Lindsey v. Normet, 405 U.S. 56, 73-74 (1972) (right to housing); Dandridge v. Williams, 397 U.S. 471, 486 (1970) (right to welfare payments).

[16] *E.g.,* Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 630-33 (1969) (state statute enabling only persons owning or leasing taxable property to vote in school district elections held unconstitutional where unsupported by compelling governmental interest); Shapiro v. Thompson, 394 U.S. 618, 627 (1969) (absence of compelling governmental interest rendered state law denying welfare benefits based on residency requirement unconstitutional).

[17] *See, e.g.,* Craig v. Boren, 429 U.S. 190, 197 (1976) (applying intermediate level review); Frontiero v. Richardson, 411 U.S. 677, 688 (1973) (plurality opinion) (utilizing strict scrutiny standard); Goesaert v. Cleary, 335 U.S. 464, 466 (1948) (rational basis test employed). One commentator has suggested that part of the problem in ascertaining the

tions during the later nineteenth and early twentieth centuries was one of extreme deference to legislative judgments concerning women's role in society.[18] Restrictions placed on women were generally upheld as serving a reasonable state interst.[19] The Supreme Court found little occasion to review legislation employing gender distinctions until the 1970's because it considered its earlier rulings dispositive of the issue.[20] Opposition to the Vietnam War during the late 1960's and early 1970's raised a flurry of equal protection objections to gender distinctions in the draft laws, which excluded women from registration and conscription.[21] In each case, the equal protection challenge was ultimately re-

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appropriate standard to apply is determining whether "a particular law does or does not amount to racial discrimination, or discrimination based on sex, or the like." Karst, *The Fifth Amendment's Guarantee of Equal Protection,* 55 N.C.L. REV. 541, 557 (1977). *See* Personnel Adm'r v. Feeney, 442 U.S. 256, 273 (1979) (employment preference laws that significantly disadvantaged women were not gender-based); Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974) (state disability insurance system that excluded from coverage disability accompanying normal pregnancy held not gender-based).

[18] *See, e.g.,* Muller v. Oregon, 208 U.S. 412, 421 (1908) (sustaining state law setting maximum number of hours females are allowed to work); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 163, 170 (1874) (upholding state constitutional provision limiting the right to vote to men); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 138 (1873) (women denied license to practice law solely on basis of sex).

[19] *See, e.g.,* Hoyt v. Florida, 368 U.S. 57, 61-62 (1961) (state law excluding women from serving on juries upheld as related to state's interest in allowing women to continue as "the center of home and family life"); Goesaert v. Cleary, 335 U.S. 464, 467 (1948) (state law prohibiting women from working as bartenders prevented social and moral problems).

[20] *See generally* Ginsburg, *Sex, Equality and the Constitution,* 52 TUL. L. REV. 451, 454-70 (1978) (discussion of Court's equal protection policy toward gender-based classifications). The lower federal courts were more active in ruling on gender-based classifications prior to the 1970's. These courts generally applied the rational basis test and rarely invalidated the challenged legislative classification. *See, e.g.,* Miskunas v. Union Carbide Corp., 399 F.2d 847, 850 (7th Cir. 1968) (statute permitting a husband, but not a wife, to sue for loss of consortium upheld), *cert. denied,* 393 U.S. 1066 (1969); Gruenwald v. Gardner, 390 F.2d 591, 592 (2d Cir. 1968) (statute according women more favorable treatment than men in computing social security benefits sustained against equal protection challenge). *But see, e.g.,* Karczewski v. Baltimore & O.R.R., 274 F. Supp. 169, 179 (N.D. Ill. 1967) (statute prohibiting only women from suing for loss of consortium violated fourteenth amendment equal protection clause); White v. Crook, 251 F. Supp. 401, 409 (M.D. Ala. 1966) (statute denying women the right to serve on juries unconstitutional).

[21] *See,e.g.,* United States v. Baechler, 509 F.2d 13, 14-15 (4th Cir. 1974) (per curiam) (rational basis existed for exluding women from draft registration), *cert. denied,* 421 U.S. 993 (1975); United States v. Bertram, 477 F.2d 1329, 1330 (10th Cir. 1973) (same); United States v. Camara, 451 F.2d 1122, 1126 (1st Cir. 1971) (same), *cert. denied,* 405 U.S. 1074 (1972); United States v. Fallon, 407 F.2d 621, 623 (7th Cir.) (same), *cert. denied,* 395 U.S. 908 (1969); United States v. Offord, 373 F. Supp. 1117, 1118 (E.D. Wis.

jected, almost always through application of the rational basis standard.[22] Commentators have discounted the significance of this body of case law to any renewed registration challenge since all were decided before the current standard of review for gender-based classifications[23] had fully evolved.[24]

The first sign of the Supreme Court's willingness to reevaluate the traditional rational basis standard in the context of sex discrimination came in *Reed v. Reed*.[25] In *Reed* a unanimous Court invalidated an Idaho statute giving preference to males over females in the appointment of estate administrators.[26] Using language evocative of the old equal protection standard, Chief Justice Burger declared that legislative classifications must rest upon some ground of difference bearing a fair and substantial relation to the object of the statute.[27] Indeed, the Court purported to apply a rational basis standard[28] and acknowledged no break with controlling precedent.[29] Clearly, however, the Court had not applied the deferential standard, but had instead postulated an unarticulated, heightened, but less than strict scrutiny of gender classifications.[30]

1974) (same); United States v. Yingling, 368 F. Supp. 379, 384-89 (W.D. Pa. 1973) (same); United States v. Dorris, 319 F. Supp. 1306, 1308 (W.D. Pa. 1970) (same); United States v. Cook, 311 F. Supp. 618, 621-22 (W.D. Pa. 1970) (same); United States v. Clinton, 310 F. Supp. 333, 336 (E.D. La. 1970) (same); Suskin v. Nixon, 304 F. Supp. 71, 72 (N.D. Ill. 1969) (same); United States v. St. Clair, 291 F. Supp. 122, 125 (S.D.N.Y. 1968) (same).

[22] *See* note 21 *supra*. Only one federal district court during this period found the exclusion of females from the draft to be unconstitutional. In United States v. Reiser, 394 F. Supp. 1060 (D. Mont. 1975), *rev'd*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976), the district court denominated sex a suspect classification and applied the strict scrutiny standard of review. 394 F. Supp. at 1063-64. On appeal, the court of appeals reversed, applying the traditional rational basis test. 532 F.2d at 673.

[23] *See* notes 50 through 54 and accompanying text *infra*.

[24] *See* Roberts, *Gender-Based Draft Registration, Congressional Policy and Equal Protection: A Proposal for Deferential Middle-Tier Review*, 27 WAYNE L. REV. 35, 53 (1980) (development of intermediate standard of review has rendered Vietnam War era cases untenable); Note, *Women and the Draft: The Constitutionality of All-Male Registration*, 94 HARV. L. REV. 406, 407-08 (1980) (war-related cases will be of little value in determining the sex discrimination issues raised by the renewal of draft registration).

[25] 404 U.S. 71 (1971).

[26] *Id.* at 73.

[27] *Id.* at 76.

[28] *See id.* The Court's purported standard was "whether a difference in the sex of competing applicants for letters of administration bears a rational relationship to a state objective that is sought to be advanced by the operation of [the contested statutes]." *Id.*

[29] *Id.* at 75-76.

[30] *See* Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving*

The next significant case in the development of a coherent intermediate standard of review for gender-based classifications was *Frontiero v. Richardson.*[31] The issue was the same as in *Reed,* but was placed in the context of military fringe benefits.[32] Writing for a plurality of the Court, Justice Brennan found sex a suspect classification, subject to strict judicial scrutiny.[33] Justice Brennan suggested three factors that make a classification suspect: (1) the class suffers from an immutable characteristic, determined solely by the accident of birth, which bears no relation to the individual's capability to contribute to society;[34] (2) the class has historically suffered discrimination and vilifications;[35] and, (3) the class, largely as a result of past discrimination,

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Doctrine on a Changing Court: A Model for Equal Protection, 86 HARV. L. REV. 1, 34 (1972) (*Reed* not reflective of traditional standard of review since statutory objectives were reasonable and effected by statute).

[31] 411 U.S. 677 (1973).

[32] Sharron Frontiero, a lieutenant in the U.S. Air Force, challenged a regulation that allowed a male service member to claim his wife as a dependent without having to prove her actual dependency. Frontiero's application for increased quarters allowances and for housing and medical benefits for her husband had been denied because she failed to prove, pursuant to the regulation, that her husband was dependent on her for more than one-half of his support. *Id.* at 680.

[33] *Id.* at 682. Joining Justice Brennan's plurality opinion were Justices Douglas, White, and Marshall. *Id.* at 678. Justice Powell, joined by Chief Justice Burger and Justice Blackmun, concurred in the judgment but refused to find sex a suspect classification. *Id.* at 691-92. Justice Stewart's one-sentence concurrence cited the holding in *Reed* as dispositive of Frontiero's claim. *Id.* at 691. Justice Rehnquist dissented. *Id.* Ironically, both Justice Brennan's plurality opinion, applying strict scrutiny, and Justice Powell's concurrence, applying the traditional rational basis test, relied on *Reed* as supporting their respective positions. *Id.* at 682, 692.

[34] *Id.* at 686.

[35] *Id.* at 685. This distinction was troublesome for the plurality. The *Frontiero* plurality divided in Kahn v. Shevin, 416 U.S. 351 (1974), where the Court upheld a Florida law providing widows but not widowers an annual $500 property tax exemption. *Id.* at 356. Justice Douglas writing for the Court in *Kahn* stated that the benign nature of the gender-based classification was substantially related to the subject of the legislation. *Id.* at 352. In dissent, Justice Brennan, joined by Justice Marshall, concluded that any gender-based distinction was suspect. Justice Brennan noted that although the Florida law was supported by the compelling governmental interest of redressing past discrimination, the state's interest would have been better served by a statute excluding wealthy widows from the tax benefits. *Id.* at 358-60. Justice White also found the classification suspect but disagreed with Justice Brennan, reasoning that the most effective remedy was a statutory scheme focusing on the individual needs of both widows and widowers. *Id.* at 361-62.

The disintegration of the *Frontiero* plurality in *Kahn* resulted primarily from *Frontiero's* compelling the exclusion of males from protection that was afforded females. *See* Wilkinson, *The Supreme Court, The Equal Protection Clause, and The Three Faces of Constitutional Equality,* 61 VA. L. REV. 945, 982-83 (1975) (men have not suffered a lacks effective political power and redress.[36] The *Frontiero* Court stressed that it found no arguable justification for the challenged classification other than administrative convenience,[37] but the Court refused to indicate how it would react to gender distinctions grounded in a strongly articulated policy basis.[38]

The continuing difficulty of the Supreme Court in clearly articulating a middle-tier standard of review was indicated by the decisions rendered in *Schlesinger v. Ballard*[39] and other sex discrimination cases decided the same year.[40] *Ballard* is one of the few major equal protection opinions dealing with military issues.[41] Suit was brought by a male naval officer challenging a military promotion system that accorded females a longer period of time than males to attain promotions necessary to continued service.[42] Relying on Justice Brennan's plurality

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history of discrimination).

[36] 411 U.S. at 686 n.17.

[37] *Id.* at 688-89.

[38] For a discussion of the Supreme Court's deferential approach to gender-based distinctions in specific policy areas, see notes 66 through 71 and accompanying text *infra.*

[39] 419 U.S. 498 (1975).

[40] Stanton v. Stanton, 421 U.S. 7 (1975), involved a challenge to a statute allowing a father to withdraw child support payments from his daughter when she reached 18 years of age. A similarly situated male would continue to receive support until age 21, theoretically enabling him to complete his education. 421 U.S. at 14-15. Relying on *Reed*, the Court concluded that the statutory distinction could not survive an equal protection attack under any test, neither strict scrutiny, rational basis, nor an intermediate standard. *Id.* at 17. Significantly, the Court did not state which test was to be applied but ruled that the statute would fail under any test. *Id.*

In Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), the gender-based distinction at issue denied a widower social security benefits after the death of his wife, who had supported him. 420 U.S. at 637-38. The Court concluded that the provision was indistinguishable from the regulation invalidated in *Frontiero. Id.* at 645. The majority rejected the Government's argument that the classification was intended to compensate women as a group for past economic discrimination. *Id.* at 648. The Court insisted that the benign intent be genuinely rooted in the actual legislative purpose. Justice Brennan stated that "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme." *Id.* at 648.

[41] *See* notes 66 through 71 and accompanying text *infra.*

[42] 419 U.S. at 499-500. The challenged statute was 10 U.S.C. § 6382(a) (1960), which provided for mandatory discharge of officers of certain rank who had failed to be selected for promotion a second time. The plaintiff, who had nine years of active service, claimed that were a woman in his position she would have been subject to a separate statute, 10 U.S.C. § 6401(a) (1960). 419 U.S. at 500. Under § 6401(a), a female Naval officer was entitled to 13 years of commissioned service before she faced mandatory discharge for want of promotion. Ballard claimed that this inequality in discharge policies constituted

opinion in *Frontiero*,[43] a three-judge federal district court invalidated the statutory provisions involved.[44] The Supreme Court reversed without explicitly stating the standard of review it applied.[45] The Court found that men and women were not similarly situated and, therefore, the disparate treatment was justified.[46] Four justices dissented, arguing that sex should be deemed a suspect class.[47]

Justice Brennan finally found his majority in *Craig v. Boren*.[48] The *Craig* Court enunciated a new middle-tier standard of review for gender-based classifications when it invalidated an Oklahoma statute having different minimum ages for men and women to purchase beer.[49] The Court stated, "To withstand constitutional challenge, . . . classifi-

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sex discrimination in violation of the due process clause of the fifth amendment. 419 U.S. at 500.

[43] *See* notes 31 through 38 and accompanying text *supra*.

[44] Ballard v. Laird, 360 F. Supp. 643, 647-48 (S.D. Cal. 1973), *rev'd sub nom.*, Schlesinger v. Ballard, 419 U.S. 498 (1975). The district court concluded that the classification was inherently suspect and that the mandatory discharge provisions were supported solely by considerations of fiscal and administrative convenience. 360 F. Supp. at 647-48.

In reaching its decision, the district court relied primarily on *Frontiero*. *Id.* Other lower courts, in interpreting *Frontiero*, have reached contradictory results. *Compare* Johnston v. Hodges, 372 F. Supp. 1015, 1018 (E.D. Ky. 1974) (applying strict scrutiny in invalidating law requiring a minor's driver's license application to be signed by father, not mother, if father is living) *with* Kovach v. Middendorf, 424 F. Supp. 72, 77 (D. Del. 1976) (applying rational basis test in upholding Navy's awarding disproportionately low number of NROTC scholarships to women) *and* Edwards v. Schlesinger, 377 F. Supp. 1091, 1096 (D.D.C. 1974) (applying rational basis in refusal to consider females for appointment to Air Force and Naval Academies), *rev'd sub nom.* Waldie v. Schlesinger, 509 F.2d 508 (D.C. Cir. 1975).

[45] 419 U.S. at 505-10.

[46] *Id.* at 508. Justice Stewart writing for the majority based the distinction on the fact that exclusion of women from combat denied women the same opportunities for promotion as men. Justice Stewart stated, "[T]he different treatment of men and women naval officers . . . reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." *Id.*

[47] Justice Brennan's dissenting opinion was joined by Justices Douglas and Marshall. *Id.* at 511. Justice White dissented without filing an opinion but noted his substantial agreement with Justice Brennan's reasoning. *Id.* at 521. Justice Brennan noted the troubling aspect of justifying one act of gender-based discrimination (different promotion times) by a second and more pervasive discriminatory scheme (exclusion of women from combat positions). *Id.* at 511 n.1.

[48] 429 U.S. 190 (1976). Justice Brennan wrote the majority opinion in which Justices White, Marshall, Powell, and Stevens joined. *Id.* at 191.

[49] *Id.* at 197. OKLA. STAT. tit. 37, § 241 (1958 & Supp. 1976) made it unlawful for any person to sell 3.2% beer to minors. A separate statute defined "minor" for purposes of § 241 as females under the age of 18 and males under the age of 21. *Id.* § 245.

cations by gender must serve important governmental objectives and must be substantially related to achievement of those objectives."[50] The Court accepted the district court's finding that the statute's legislative purpose was the improvement of traffic safety,[51] but it found that there was an insufficient relationship between the desired end and the selected means of implementation[52] to support the gender-based differential.[53] *Craig* was also important because it demonstrated the Court's willingness to strike down gender distinctions that discriminated against men as well as against women.[54] The *Craig* test of whether a statute or regulation impermissibly discriminates on the basis of gender has been applied consistently by the Supreme Court since 1976 but with varying results. For example, the Court has invalidated statutory schemes that distinguished between widows and widowers in awarding survivor's benefits.[55] On the other hand, statutes providing for a gender-based distinction as a reasonable means of compensating women as a class for past economic discrimination have generally been upheld.[56] Other post-*Craig* developments included the acceptance of a more general justification for striking down gender-based classifications.[57] The Supreme Court has further clarified *Craig* by declaring that the burden of proof is on those defending the discriminatory statute to establish the claimed justification.[58]

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[50] 429 U.S. at 197. The Court relied on *Reed, Stanton, Wiesenfeld,* and *Frontiero* as authority for the heightened standard of review. *Id.* at 197-99. Subsequent cases and commentaries cite *Reed* as the origin of the intermediate scrutiny standard. *See, e.g.,* Michael M. v. Superior Court, 101 S. Ct. 1200, 1204 (1981) (plurality) (noting that *Craig* restated *Reed* test); Orr v. Orr, 440 U.S. 268, 278-81 (1979) (same); Steele, *Males Only Draft Registration: An Equal Protection Analysis,* 11 CUM. L. REV. 295, 299 n.18 (1980) (suggesting that the utilization of the heightened review standard in *Craig* conformed to the Court's evolving trend); Ginsberg, *Sex, Equality and the Constitution,* 52 TUL. L. REV. 451, 458 (1978) (*Reed* marked initial departure from rational basis analysis).

[51] 429 U.S. at 199-200.

[52] *Id.* at 204. Exhaustive evidence dealing with the statistical relationship between age, sex, drinking, and traffic accidents was presented and evaluated. *Id.* at 200-03 & 200 n.8, 201 nn.9 & 11, 202 nn.12-14, 203 n.16. The Court concluded that, while in some instances statistical analysis might be beneficial, attempts to prove broad sociological theories by statistics was a "dubious business, and one that inevitably is in tension with the normative philosophy that underlies the Equal Protection Clause." *Id.* at 204.

[53] *Id.* The Court did not articulate why the relationship was insufficient, but merely concluded that it was not satisfied "that sex represents a legitimate, accurate proxy for the regulation of drinking and driving." *Id.* The Court expressly disapproved Goesaert v. Cleary, 335 U.S. 464 (1948), to the extent that it was inconsistent with *Craig.* 429 U.S. at 210 n.23; *see* note 19 *supra.*

[54] 429 U.S. at 204; *see* Note, *Women and the Draft: The Constitutionality of All-Male Registration,* 94 HARV. L. REV. 406, 410 (1980) (same standard of review is applied to gender-based classifications whether challenged by men or by women); *cf.* Caban v. Mohammed, 441 U.S. 380, 391-92 (1979) (law requiring illegitimate child's mother's consent prior to its adoption held unconstitutional where consent rights of unwed father were not considered).

[55] *See* Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 153 (1980) (survivor's benefits paid to widows automatically upon death of husband, but widowers required to prove dependence upon deceased wife's earnings); Califano v. Goldfarb, 430 U.S. 199, 201-02 (1977) (plurality) (survivor's benefits automatically paid to widow, but widower must prove he received one-half of support from wife). Both *Wengler* and *Goldfarb* contained

In the Supreme Court's most recent consideration of gender-based discrimination, *Michael M. v. Superior Court,*[59] the Court restated its adherence to the *Craig* standard,[60] but ruled that a statutory rape law under which men alone could be held criminally liable did not unlaw-

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discussions as to whom the challenged statute actually discriminated against: the surviving male spouse or the deceased female wage-earner. The plurality in *Goldfarb* concluded that the distinction discriminated against the deceased female wage-earner, 430 U.S. at 208, while Justice Stevens, who concurred in the judgment, insisted that the provisions discriminated against the surviving male spouse. *Id.* at 218. The majority in *Wengler* apparently settled this controversy by ruling that the challenged statute discriminated against *both* men and women. 446 U.S. at 147.

[56] *E.g.,* Califano v. Webster, 430 U.S. 313, 317 (1977) (upholding provision of the Social Security Act allowing women to compute benefits with a more favorable formula than men). The *Webster* Court applied the *Craig* intermediate standard and concluded that the test had been satisfied, noting that the statutory scheme was more closely related to those upheld in *Kahn* and *Ballard* than to those invalidated in *Wiesenfeld* and *Goldfarb. Id.* The Court reasoned that the more favorable treatment accorded women was not the result of "archaic and overbroad generalizations" (quoting Schlesinger v. Ballard, 419 U.S. 498, 508 (1975)), or of "the role-typing society has long imposed" on women (quoting Stanton v. Stanton, 421 U.S. 7, 15 (1975)). The Court further reasoned that the only discernible purpose for the more favorable treatment was to redress "society's longstanding disparate treatment of women." 430 U.S. at 317 (quoting Califano v. Goldfarb, 430 U.S. 199, 209 n.8 (1977)). The Court concluded that such remedial, or benign, discrimination served an important governmental interest and that the gender classifications were substantially related to achieving the interest. 430 U.S. at 320-21.

[57] In Orr v. Orr, 440 U.S. 268 (1979), the Court held that an Alabama law imposing alimony obligations solely on males without regard to the dependency of either spouse carried with it "the baggage of sexual stereotypes." *Id.* at 283. The Supreme Court invalidated the law as an unjustified gender distinction in violation of the equal protection clause. *Id.* at 284. Justice Brennan commented, "Legislative classifications which distribute benefits . . . on the basis of gender carry the inherent risk of reinforcing stereotypes about the 'proper place' of women and their need for special protection." *Id.* at 283.

[58] Wengler v. Druggists Mut. Ins. Co., 446 U.S. 142, 151 (1980).

[59] 101 S. Ct. 1200 (1981).

[60] *Id.* at 1204; *see* Kirchberg v. Feenstra, 101 S. Ct. 1195, 1198 (1981) (applying *Craig* to hold unconstitutional a statute allowing husband the unilateral right to dispose of property jointly owned with wife).

fully discriminate on the basis of gender.[61] The Court reasoned that men and women were not similarly situated and that the law furthered an important governmental interest.[62] *Michael M.* indicated that the difficult burden of justifying a gender-based classification placed on the state can, in some instances, be overcome because of the importance of the governmental objective.[63] Further, the Supreme Court has shown a willingness to defer to the judgment of the legislative branch when considering gender-based classifications in some specific contexts, including state taxation[64] and immigration policy.[65]

Significantly, the Court has consistently taken a position of extreme deference to Congress when considering challenges to legislative enactments regarding national defense and military preparedness.[66] *Schlesinger v. Ballard*[67] is particularly relevant to an equal protection challenge to a renewed draft registration that excludes women. *Ballard,* unlike *Frontiero,*[68] involved important questions of military policy. The military promotion policy at issue in *Ballard* was rooted in statutory restrictions against women serving in combat,[69] and that policy was the basis for Congress' exclusion of women from draft registration.[70] It is worthy of note that *Ballard* did not apply a different equal protection standard because of the military context of the case but, rather, stressed the deference due Congress when it acts pursuant to constitutional authority to raise and regulate armies.[71]

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[61] 101 S. Ct. at 1206.

[62] *Id.* The statute's stated purpose was to prevent teenage pregnancies. *Id.* at 1205. In his majority opinion, Justice Rehnquist noted that the statute "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." *Id.* at 1208.

[63] Justice Brennan, one of four dissenters, asserted that the desirability of achieving the state's goal of preventing teenage pregnancies was overly emphasized to the detriment of "the fundamental question of whether the sex-based discrimination in the California statute is *substantially* related to the achievement of that goal." *Id.* at 1214.

[64] *See* Kahn v. Shevin, 416 U.S. 351, 355 (1974) (states have great discretion in determining classifications for tax purposes).

[65] *See* Fiallo v. Bell, 430 U.S. 787, 791, 795 (1977) (deferring to congressional judgment in upholding immigration restrictions giving preference to mothers of illegitimate children who are United States citizens, but withholding preference from the natural father).

[66] *See, e.g.,* Gilligan v. Morgan, 413 U.S. 1, 5, 10 (1973) (refused, on political question grounds, to address merits of plaintiff's request to undertake continuous judicial supervision of Ohio National Guard); Gillette v. United States, 401 U.S. 437, 462 (1971) (justified distinction between conscientious objectors on ground that Congress has compelling interest in maintaining efficient and workable draft system); United States v. O'Brien, 391 U.S. 367, 377-78 (1968) (extreme deference accorded Congress in upholding law making destruction of draft card a crime). *See generally* Roberts, *supra* note 24, at 82-89.

[67] *See* notes 39 through 47 and accompanying text *supra.*

[68] *See* notes 31 through 38 and accompanying text *supra.*

[69] 419 U.S. at 508. Combat restrictions in the Navy and Air Force are governed by 10 U.S.C. § 6015 (1976 & Supp. III 1979), which provides that "women may not be assigned to duty on vessels or in aircraft that are engaged in combat missions," and *id.*

In the instant case the Court reasoned that since Congress was given constitutional authority to regulate the armed forces of the United States,[72] and since the MSSA, enacted pursuant to this constitutional grant of authority, was inherently concerned with national defense and military affairs,[73] and since Congress specifically had considered the question of the MSSA's constitutionality,[74] the Court should defer to the congressional findings.[75] The Court further reasoned that since registration was specifically linked to the possibility of induction, since any induction would be characterized by a need for combat troops,[76] and since women are precluded by both statute and policy

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§ 8549 (1976), which declares that women in the Air Force "may not be assigned to duty in aircraft engaged in combat missions." The Army and the Marine Corps prohibit the use of women in combat as a matter of established policy. PRESIDENTIAL RECOMMENDATIONS FOR SELECTIVE SERVICE REFORM, H.R. DOC. No. 265, 96th Cong., 2d Sess. 25-26 (1980).

[70] *See* S. REP. No. 826, 96th Cong., 2d Sess. 157, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2612, 2646-47 (policy precluding use of women in combat was primary reason for exclusion from registration system).

[71] 419 U.S. at 510.

[72] *See* note 2 *supra.*

[73] *See* note 2 *supra.*

[74] *See* S. REP. No. 826, 96th Cong., 2d Sess. 159-61, *reprinted in* [1980] U.S. CODE CONG. & AD. NEWS 2643, 2650 (concluding that a male-only draft was constitutional). After conducting hearings on the President's plan to register women, Congress rejected the proposal, primarily because of the perceived absence of any military need for registering women and because of combat restrictions on women. S. REP. No. 826, *supra,* at 157. Referring to testimony that 80,000 women conscripts could be usefully employed in the event of a draft, Justice Rehnquist's majority opinion stated that "Congress carefully evaluated the testimony . . . and rejected it in the permissible exercise of its constitutional responsibility." 101 S. Ct. at 2660. Justice Rehnquist distinguished the instant case from previous cases dealing with gender-based discrimination because, in the instant case, "Congress did not act 'unthinkingly' or 'reflexively and not for any considered reason.' " *Id.* at 2655.

[75] *Id.* at 2651-52, 2654. The Court, however, cautioned: "None of this is to say that Congress is free to disregard the Constitution when it acts in the area of military affairs . . . . Congress remains subject to the limitations of the Due Process Clause, . . . but the test and limitations to be applied may differ because of the military context." *Id.* at 2653.

[76] *Id.* at 2657. The Court relied on S. REP. No. 826, *supra* note 70, at 160, which explained that in any future draft facilitated by the registration plan, "the primary manpower need would be for combat replacements." 101 S. Ct. at 2657.

from combat positions,[77] then men and women were not similarly situated as to registration.[78] The Court concluded that since men and women were not similarly situated, since the exemption of women from registration was closely related to Congress' purpose in authorizing registration,[79] and since raising and supporting armies was an important governmental interest, Congress did not violate the equal protection component of the fifth amendment when it authorized the registration of only males under the MSSA.[80]

In dissent, Justice Marshall[81] argued that while the majority purported to apply the substantial relation test, it had not, in fact, done so.[82] He reasoned that since the challenged legislative enactment utilized a gender-based classification, the applicable test should be whether the classification is substantially related to the achievement of an important governmental objective.[83] Justice Marshall stated that since the parties defending the challenged classification must bear the burden of proof in demonstrating the substantial relationship between the discriminatory classification and the importance of the governmental interest served,[84] the Government was required to show that the registration of females would substantially impede its efforts to prepare for a draft of combat troops.[85] Further, Justice Marshall reasoned that since the registration of women would not hinder preparations for a draft of combat troops[86] and since there would be a need for women conscripts in the event of mobilization,[87] the Government had not met its burden of demonstrating that the exclusion of women from registration was substantially related to maintaining an adequate defense; therefore, the MSSA unconstitutionally discriminated between the sexes.[88]

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[77] 101 S. Ct. at 2657; *see* note 69 *supra.*

[78] 101 S. Ct. at 2658. The majority rejected the district court's finding that the military's need for women was irrelevant to the issue of their registration. *Id.* Concluding that men and women were not similarly situated for purposes of a draft or draft registration, the Supreme Court found that the reason women were exempted from registration was not that military needs could be met better by drafting only men. *Id.* The Court stated: "This is not a case of Congress arbitrarily choosing to burden one of two similarly situated groups, such as would be the case with an all-black or all-white, or an all-Catholic or all-Lutheran, or an all-Republican or all-Democratic registration." *Id.*

[79] *Id.*

[80] *Id.* at 2660.

[81] Joining Justice Marshall in dissent was Justice Brennan. *Id.* at 2662. Justice White delivered a separate dissent, also joined by Justice Brennan. *Id.* at 2661. Justice White rejected the majority's conclusion that Congress had decided that every position in the military should be filled by combat-trained personnel. *Id.* at 2661-62. Justice White, therefore, found no basis for discriminating between males and females in securing personnel for non-combat positions. *Id.* at 2662. Additionally, Justice White questioned the majority's finding that all the positions for which women would be eligible in wartime would be filled by female volunteers. *Id.* at 2661.

[82] *Id.* at 2666. Justice Marshall contended that the "similarly situated" analysis employed by the majority differed significantly from the "substantial relationship" test in *Craig v. Boren. Id; see* note 50 and accompanying text *supra.*

[83] 101 S. Ct. at 2666.

[84] *See* text accompanying note 58 *supra.*

[85] 105 S. Ct. at 2663, 2666. Justice Marshall agreed with the majority's conclusion

By holding that male-only draft registration does not discriminate between the sexes in violation of the fifth amendment's guarantee of equal protection,[89] the Supreme Court has further confused an already confusing set of equal protection standards. The decision in the instant case adopts what could be called a "lower-middle-tier" analysis for gender-based classifications. It purports to accept the applicability of the *Craig* test but applies it with a large degree of deference to congressional decisionmakers.[90] Such an analysis, however, tends to focus

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that the government's interest in registration and possible conscription was an "important governmental interest" and that, consequently, the first part of the *Craig* test had been satisfied. Justice Marshall's argument centered, however, on whether the discriminatory means employed substantially served the statutory end. *Id.* at 2663.

[86] *Id.* at 2667. Justice Marshall suggested that preparations for a draft of combat troops could be effected by registering both men and women, but drafting only men if only men were needed. *Id.* Justice Marshall emphasized that the constitutionality of a statute governing conscription and of the statutes and policies prohibiting women from serving in combat positions was not an issue in the case. *Id.* at 2662. As an alternative system, Justice Marshall suggested a registration classification based on combat eligibility rather than on gender. He noted that under the challenged scheme a significant number of males ineligible for combat, either because of physical handicaps or their conscientious objector status, were nevertheless required to register. *Id.* at 2667 n.11.

[87] Justice Marshall relied on testimony before the Senate Armed Services Committee that the armed forces could usefully employ at least 80,000 women conscripts in supportive, non-combat functions from a total of 650,000 draftees needed in the event of a major European war. *Id.* at 2670, 2673. Justice Marshall acknowledged that if the law required men and women to be drafted in equal numbers military flexibility would be severly strained. He noted, however, that there had been no testimony that simultaneous induction of equal numbers of men and women draftees was either necessary or desirable. *Id.* at 2674.

[88] *Id.* at 2670. Justice Marshall rejected the majority's extreme deference to congressional action concerning military affairs as a substitution of "hollow shibboleths . . . for constitutional analysis," *id.* at 2675-76, and stated that "the phrase 'war power' cannot be invoked as a talismanic incantation to support any exercise of congressional power which can be brought within its ambit." *Id.* at 2676 (quoting United States v. Robel, 389 U.S. 258, 263-64 (1967)).

[89] 101 S. Ct. at 2660.

[90] *See* 101 S. Ct. at 2654. The Court stated that the *Craig* standard was applicable, *id.*, but that "the test and limitations to be applied may differ because of the military context." *Id.* at 2653; *see* text accompanying note 71 *supra*.

not on the substantial relationship of the discriminatory means of implementation employed, but only on the important governmental interest served.[91] Taken together with *Michael M.,*[92] the instant case shows a disturbing willingness by the Supreme Court to discard *Craig's* rigid scrutiny of gender classifications in favor of an unbalanced emphasis on the importance of the governmental objective.[93] The dissent concedes the importance of the government interest involved, but correctly insists that under *Craig* a finding of an important governmental interest is by itself insufficient to uphold a sexually discriminatory statute.[94] The fundamental question of the gender-based discrimination's *substantial* relationship to the achievement of the government's goal was carefully avoided by the majority. Justice Rehnquist's heavy reliance upon congressional findings concerning the role of women in the military transformed the instant case into a separation of powers case treating sex-based discrimination as only a peripheral issue. As Justice Brennan's dissent in *Ballard* pointed out, there is a sort of perverse irony in basing the justification for one discriminatory policy, exclusion of women from registration, upon an even more pervasive policy of sex-based discrimination, combat restrictions on women.[95] In so doing, the majority's opinion will likely further the sexual stereotyping the Supreme Court has consistently disavowed since *Reed.*[96] The immediate constitutional impact of the instant case will likely be limited by the reasoning of the opinion;[97] however, the validity of *Craig* is now questionable in areas of traditional deference to Congress, such as the military. *Goldberg* presented the court with a unique factual situation clouded with issues of national security and separation of powers—the exclusion of women from compulsory military service. The majority's modified test rests on precedents according deference to Congress in military affairs,[98] and not on abandonment of the *Craig* standard.[99] For this reason, *Goldberg* should be readily distinguishable from most future gender-based discrimination cases, and *Craig* should remain controlling precedent for cases involving claims of sex discrimination in a non-military context.

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[91] *See* note 85 and accompanying text *supra.*

[92] *See* notes 59 through 63 and accompanying text *supra.*

[93] Justice Marshall stated, "Congressional enactments in the area of military affairs must, like all other laws, be *judged* by the standards of the Constitution." 101 S. Ct. at 2676.

[94] *See* note 63 and accompanying text *supra.*

[95] *See* note 47 *supra.*

[96] *See, e.g.,* Orr v. Orr, 440 U.S. 268, 273 (1979) (invalidating law fostering sexual stereotyping); Stanton v. Stanton, 421 U.S. 7, 15 (1975) (disavowing the tradition of role-typing imposed on women by society); Schlesinger v. Ballard, 419 U.S. 497, 508 (1975) (eschewing "archaic and overbroad generalizations").

[97] *See* notes 72 through 80 *supra.*

[98] 101 S. Ct. at 2651-55.

[99] *Id.* at 2654.

John Sneed

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